5. 2943

No. 14803

United States
Court of Appeals
for the Ninth Circuit

ALFIO BATELLI,

Appellant.

vs.

KAGAN & GAINES CO., INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-11-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

SYDNEY S. FINSTON,
1680 North Vine Street,
Hollywood 28, California.

Attorney for Appellee:

SCHWARTZ & ALSCHULER,
9441 Wilshire Boulevard,
Beverly Hills, California.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16770-HW

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

COMPLAINT FOR DAMAGES FOR BREACH OF EMPLOYMENT AGREEMENT

Comes now the Plaintiff and alleges that:

First Cause of Action

I.

Plaintiff is a corporation duly organized and existing under the laws of the State of Illinois with its principal place of business in the City of Chicago, State of Illinois.

II.

Defendant is a resident of the County of Los Angeles and is a citizen of the State of California.

III.

In this suit there is a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00). [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

For many years last past Plaintiff has been engaged in the business of manufacturing, repairing and selling musical instruments of all types and by June 30, 1951, Plaintiff had acquired a reputation for dependable and reliable service and expert workmanship.

V.

On or about September 15, 1947, Defendant was employed by Plaintiff on a weekly basis at a salary of Thirty-five Dollars ($35.00) per week as a repairer and maker of string instruments. Defendant worked under the personal supervision of the president of the Plaintiff corporation. Plaintiff expended great effort in training, instructing and otherwise improving the performance of Defendant in his work, and Plaintiff further spent much time, effort and money in advertising and making known to Plaintiff's customers the name and ability of Defendant to the extent that Defendant's services became an integral and valuable part of Plaintiff's business and good will.

VI.

On or about June 10, 1950, Plaintiff and Defendant entered into a written employment agreement, copy of which is attached hereto and marked Exhibit "A" and by this reference incorporated herein as a part hereof. Under the terms of said agreement, among other things, the parties agreed that the Defendant would be employed by the

Plaintiff for a period of five (5) years as a repairer of string instruments and all other duties attendant upon said type of craftsmanship, it being further agreed that said services by Defendant were to be performed at such place as may be designated by the Plaintiff. It was further agreed that said services were to be rendered exclusively to the Plaintiff and that in the event either party desired to terminate said agreement, such termination could be effected by the [3] service of a ninety-day notice in writing, said notice to be served at the place designated in said written agreement.

VII.

Following the execution of the aforementioned written agreement Defendant continued in the employ of Plaintiff until June 30, 1951.

VIII.

Defendant breached his agreement with Plaintiff in that he willfully failed and neglected to comply with Paragraph 3 of said agreement, to wit: Defendant did not serve Plaintiff with ninety-day notice of termination, but on the contrary, on June 30, 1951, Defendant orally requested Plaintiff's permission to leave for Europe for the purpose of bringing Defendant's family back with him to the United States and that Defendant would return to work within five or six weeks from his departure. Defendant at no time thereafter notified Plaintiff by writing or otherwise that Defendant would not return to work for Plaintiff nor at any time there-

after did Defendant communicate with Plaintiff in any manner to the present date.

IX.

During the six-week period of time following Defendant's leaving Plaintiff's employ for the Defendant's stated purpose of going to Europe, Plaintiff informed its customers that work on their instruments would be temporarily delayed until Defendant returned; Plaintiff finally found it necessary to return to customers their instruments because Plaintiff was not in a position to perform the work by reason of the fact that because Plaintiff expected Defendant to return when he had promised he would, Plaintiff made no effort to replace Defendant until several months had elapsed, so that as a direct and proximate result of Defendant's wrongful breach Plaintiff suffered great and serious damage to its business, all to [4] Plaintiff's damage in the sum of Fifteen Thousand Dollars ($15,000.00), no part of which has been paid.

Second Cause of Action

I.

Plaintiff repeats and realleges Paragraphs I to VII of the First Cause of Action and by this reference adopts the same as though fully set forth herein.

II.

Defendant breached the aforementioned written agreement, and in particular, Paragraph 2 thereof,

in that between June 10, 1950, and June 30, 1951, the exact dates being unknown to Plaintiff, Defendant did not render his services exclusively to Plaintiff, but on the contrary, Defendant manufactured violins and sold them without the knowledge and consent of Plaintiff and retained for his own account the moneys Defendant received for said instruments, all to Plaintiff's damage in the amount of Fifteen Hundred Dollars ($1500.00), no part of which has been paid.

Third Cause of Action

I.

Plaintiff repeats and realleges Paragraphs I to VII of the First Cause of Action and by this reference adopts the same as though fully set forth herein.

II.

While in the employ of the Plaintiff and within three years last past Defendant willfully appropriated goods and materials belonging to the Plaintiff and sold said goods and materials which Defendant fabricated into string instruments for his own account, without the knowledge or consent of Plaintiff, all to Plaintiff's damage in the amount of Fifteen Hundred Dollars ($1500.00), no part of which has been paid. [5]

Fourth Cause of Action

I.

Plaintiff repeats and realleges Paragraphs I to VII of the First Cause of Action and by this ref-

erence adopts the same as though fully set forth herein.

II.

While in the employ of the Plaintiff and within three (3) years last past Defendant sold string instruments belonging to the Plaintiff and willfully failed and refused to account to the Plaintiff for all moneys received by Defendant.

Wherefore, Plaintiff prays judgment of the Court as follows:

1. That Plaintiff recover from the Defendant the sum of Fifteen Thousand Dollars ($15,000.00) as general damages.

2. That Plaintiff recover from the Defendant the sum of Fifteen Hundred Dollars ($1500.00) as special damages or in the alternative, that Defendant be required to account to Plaintiff for all sums received by him in the sale by him of Plaintiff's instruments.

3. For interest and costs of suit, and

4. For such other and further relief as the Court may deem proper.

SCHWARTZ AND ALSCHULER

By /s/ BENJAMIN F. SCHWARTZ,
Attorneys for Plaintiff. [6]

EXHIBIT A

This Agreement, made and entered in this first day of June, 1950, by and between Kagan & Gaines Co., Inc., an Illinois corporation hereinafter to be referred to as: First Party, and Alfio Batelli, of Chicago, Ill., hereinafter to be referred to as: Second Party,

1. First Party agrees to employ the Second Party for a period of five years from the date of this agreement, the services of the Second Party to consist of string instrument repairing and all other duties attendant on this type of craftsmanship. All such aforementioned services on the part of the Second Party are to be performed at such place or places as are to be designated by the First Party.

2. Second Party accepts the employment for the term aforesaid, and agrees to render his services exclusively and faithfully to the best of his ability and to the satisfaction of the First Party.

3. Should either of the aforementioned parties be desirous at any time of terminating this agreement, then it shall be the duty of such party to serve the other with three hundred sixty-five days notice in writing, such notice to be served at 228 S. Wabash Ave.

4. Party of the First Part agrees to pay the Party of the Second Part the sum of not less than $75.00 per week.

5. If, because of illness or disability, Second Party is unable for a period of 30 days to render the aforementioned services then the First Party shall have the right to terminate this contract on ten days written notice.

6. Inasmuch as the Second Party is deeply grateful to the First Party for his untiring effort on behalf of the Second [7] Party in helping him to establish himself as a citizen in the United States of America, and whereas the Second Party is anxious to demonstrate such gratitude by his faithful devotion to the enterprise of the First Party, now, therefore, the Second Party does agree for the duration of this contract to utilize his full talents and powers in the enhancement and furtherance of the aforementioned enterprise and furthermore should the Second Party act according to section three of this agreement he hereby promises to do no act of commission or omission which might in any way interfere with the safety and welfare of the aforementioned concern of the First Party.

KAGAN & GAINES CO., INC.,

By ROBERT KAGAN,
President.

/s/ ALFIO BATELLI.

[Endorsed]: Filed May 13, 1954. [8]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16,770-HW

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

ANSWER

Defendant Alfio Batelli answering the complaint admits, denies, and alleges as follows:

As to First Cause of Action

I.

Answering Paragraph IV, denies that plaintiff ever or at all acquired a reputation either for dependable or reliable service or for expert workmanship.

II.

Answering Paragraph V, denies generally and specifically each and every allegation contained therein except that he admits that he did work for plaintiff involuntarily from about the date stated and that he did receive Thirty-five ($35.00) Dollars per week. [9]

III.

Answering Paragraph VI, denies generally and specifically each and every allegation contained

therein, except that he admits that he signed a paper similar to that marked Exhibit "A," but that said paper was never intended by either of the parties to bind either of them, and that both parties so specifically orally stated.

IV.

Answering Paragraph VII, denies generally and specifically each and every allegation therein contained, except that defendant admits that he did work for plaintiff involuntarily until about the time stated.

V.

Answering Paragraph VIII, denies generally and specifically each and every allegation contained therein; denies that he ever or at all breached any agreement whatever; denies that said alleged agreement ever was in fact or law an agreement or that either of the parties ever intended it to be binding on either, or anyone at all.

VI.

Answering Paragraph IX, denies generally and specifically each and every allegation contained therein; denies that plaintiff suffered either great or serious or any damage whatever either to its business or reputation or good will or to anything at all; denies that plaintiff was damaged in the sum of Fifteen Thousand ($15,000.00) Dollars or in any other sum or at all.

As and for a First Separate and Distinct Affirmative Defense

I.

While defendant was working for plaintiff, plaintiff instructed the defendant to work upon inferior and cheap factory-made [10] violins and amateurishly built instruments and to give such violins and instruments the appearance of fine and expensive old instruments so that they could be sold to the public as such.

II.

While defendant was working for plaintiff, plaintiff instructed defendant to create and insert false, fraudulent, and misleading labels into inferior, cheap factory-made violins and amateurishly built instruments so that they would acquire the appearance of authentic creations of old recognized fine masters to enable plaintiff to deceive the public as to the origin of such instruments and to enable plaintiff to sell such instruments as original creations of old recognized fine instrument makers.

III.

While defendant was working for plaintiff, plaintiff instructed defendant to create and insert false, fraudulent, and misleading labels into inferior, cheap factory-made violins and amateurishly built instruments, the labels to contain Italian names of fictitious non-existent makers in order to enable plaintiff to deceive the public as to the origin of such instruments and to enable the plaintiff to sell

such instruments as creations of old Italian masters, who never even existed.

IV.

While defendant was working for plaintiff, plaintiff instructed defendant that when plaintiff would bring a customer to defendant with an instrument for purposes of appraisal by defendant, if plaintiff held the instrument with his, plaintiff's, thumb up defendant was to exalt the value and quality of the instrument regardless of its true value and true quality, and on the other hand if plaintiff held the instrument with his, plaintiff's, thumb down, defendant was to derogate and depreciate [11] the value and qualities of the instrument regardless of its true value and true qualities.

V.

While defendant was working for plaintiff, plaintiff turned over to defendant a number of cheap Czechoslovakian violins, and instructed defendant to transform them into modern, valuable-appearing Italian creations, and to bear the label of defendant as original creator in order to enable plaintiff to deceive the public and in order to pass such instruments to the public as original creations of defendant.

VI.

Defendant protested and refused to obey the instructions outlined in the five previous paragraphs, and when plaintiff insisted upon compliance defendant terminated his association with plaintiff.

VII.

By reason of all the foregoing defendant's termination of association with plaintiff was with good, sufficient, and legal cause.

As to Second Cause of Action

I.

Answering Paragraph I, repeats and realleges his answer to Paragraphs IV, V, VI and VII of the First Cause of Action as though herein at this point set out verbatim.

II.

Answering Paragraph II, denies generally and specifically each and every allegation contained therein; denies that he ever or at all breached any agreement whatever; denies that said alleged agreement ever was in fact or law an agreement or that either of the parties ever intended it to be binding on either of them or on anyone at all; denies that plaintiff was damaged in [12] the amount of Fifteen Thousand ($15,000.00) Dollars or in any other amount or at all.

As and for a First Separate and
Distinct Affirmative Defense

I.

Repeats and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI, and VII of his first affirmative defense to the first cause of action.

As to Third Cause of Action

I.

Answering Paragraph I, repeats and realleges his answer to Paragraphs IV, V, VI and VII of the first cause of action as though herein at this point set out verbatim.

II.

Answering Paragraph II, denies generally and specifically each and every allegation contained therein; denies that he ever or at all appropriated goods or materials or anything whatever belonging to plaintiff; denies that he ever or at all sold anything belonging to plaintiff for his, defendant's, own account; denies that plaintiff was damaged in the sum of Fifteen Hundred ($1500.00) Dollars or in any other sum or at all.

As and for a First Separate and Distinct Affirmative Defense

I.

Repeats and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI and VII of his first affirmative defense to the first cause of action. [13]

As to Fourth Cause of Action

I.

Answering Paragraph I, repeats and realleges his answer to Paragraphs IV, V, VI and VII of the

First Cause of Action, as though herein at this point set out verbatim.

II.

Answering Paragraph II, denies generally and specifically each and every allegation contained therein; denies that he ever or at all sold string instruments or anything else whatever belonging to plaintiff while willfully or otherwise failing or refusing to account to plaintiff.

As and for a First Separate and Distinct Affirmative Defense

I.

Repeats and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI and VII of his first affirmative defense to the first cause of action.

Wherefore, defendant prays for judgment as follows:

That plaintiff take nothing by reason of his complaint, and that defendant be awarded his costs and disbursements herein.

/s/ SYDNEY S. FINSTON,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1954. [14]

[Title of District Court and Cause.]

CROSS-COMPLAINT

Defendant and cross-complainant Alfio Batelli respectfully alleges:

I.

For the sake of convenience and to avoid confusion, cross-complainant is hereinafter referred to as defendant and cross-defendant is hereinafter referred to as plaintiff.

II.

That at all the times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois with its principal place of business in the city of Chicago, State of Illinois.

III.

That on or about the 28th day of November, 1952, plaintiff willfully, maliciously, and without reasonable or probable cause, and with intent to vex, harrass, and injure defendant, and to [16] put defendant to cost in and about his defense and to compel defendant to submit to plaintiff's extortionate demands, commenced an action in this court against the defendant for the recovery of Sixteen Thousand Five Hundred ($16,500.00) Dollars upon an alleged contract, almost identical with the alleged contract set forth in the complaint in the instant suit.

IV.

That said prior action bears file number 14787-Y, and the pleadings therein are now in this cross-

complaint, incorporated by reference as though herein at this point set forth verbatim.

V.

That said alleged contract upon which said prior suit was based was not intended by either of the parties to have any binding effect whatsoever upon either of them, and plaintiff well knew and understood this at the time it instituted said prior suit.

VI.

That plaintiff maliciously, and without probable cause, had caused a summons to be issued out of this court bearing file number 14787-Y, as aforesaid, and to be served upon defendant herein, requiring him to appear and answer the complaint therein. Defendant had been obliged to and did appear by attorney and did answer and defend said action. Said action was tried before this court on or about March 30, 1954, and a judgment was duly given, made, and entered by this court in favor of the defendant and against the plaintiff. No appeal has been taken from said judgment and it has now become final and remains in full force and effect.

VII.

That defendant necessarily incurred, in defending said prior suit, attorney's fees and disbursements in the sum of Three Hundred Twenty-eight and 85/100 ($328.85) Dollars. That by reason of the commencement and prosecution of said prior suit [17] defendant was damaged in the further sum of Ten

Thousand ($10,000.00) by way of injury to his credit, standing and reputation, and by way of neglect of his business, and by way of great pain and mental anguish.

VIII.

That in doing the things herein alleged plaintiff had acted maliciously and was guilty of a wanton disregard of the rights and feelings of defendant, and by reason thereof defendant requests punitive damages for the sake of example and by way of punishing plaintiff, in the sum of Ten Thousand ($10,000.00) Dollars.

Wherefore, defendant requests judgment as follows:

(1) For the sum of $10,328.85 as and for compensatory damages.

(2) For the sum of $10,000.00 as and for exemplary and punitive damages.

(3) For the costs and disbursements of this suit.

(4) For such other relief as to the court may appear proper on the premises.

/s/ SYDNEY S. FINSTON,
Attorney for Defendant and
Cross-Complainant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1954. [18]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Plaintiff and cross-defendant answers the cross-complaint herein as follows:

Defendant denies each and all of the allegations generally and specifically contained in Paragraphs III, V, VI, VII and VIII.

Wherefore plaintiff and cross-defendant prays for an Order dismissing the cross-complaint, and for judgment on the complaint as prayed for in the complaint on file herein; and for such other and further relief as to the Court may seem just and proper.

SCHWARTZ & ALSCHULER,

By /s/ BENJAMIN F. SCHWARTZ,
Attorneys for Plaintiff and
Cross-Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 17, 1954. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial in the within Court on the 9th day of March, 1955, before The Honorable Leon R. Yank-

wich, Judge presiding and sitting without a jury in and for the Southern District of California, at Los Angeles, California, and the plaintiff being represented by Schwartz & Alschuler, by Benjamin F. Schwartz, Esquire, and the defendant having been represented by Sydney S. Finston, Esquire, and the Court having heard the testimony of the witnesses for the plaintiff and the defendant having testified in his own behalf, and the Court having examined the documentary evidence and having heard argument of counsel, the Court now makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff Kagan & Gaines Co., Inc., is a corporation duly organized and existing under the laws of the State of Illinois [22] with its principal place of business in the City of Chicago, State of Illinois, and is a citizen of the State of Illinois.

2. Defendant is a resident of the County of Los Angeles and is a citizen of the State of California.

3. This suit involves a controversy between citizens of different states and the matter in dispute exceeds the sum of Three Thousand ($3000.00) Dollars exclusive of interest and costs, and this Court has jurisdiction to hear and determine the issues in this cause and to render judgment therein.

4. On September 15, 1947, plaintiff employed defendant as a repairer and maker of stringed in-

struments and said employment was on a weekly basis.

5. On or about June 10, 1950, plaintiff and defendant entered into a written employment agreement, the terms of which were in part as follows:

(a) Defendant was to render services to plaintiff consisting of repairing of stringed instruments and other duties attendant on this type of craftsmanship; such services were to be performed at such place or places designated by plaintiff.

(b) Defendant was to render his services exclusively to plaintiff; either party had the right to terminate the agreement by service of 365 days notice of termination in writing, such notice to be served at the place of business of plaintiff.

(c) Defendant was to receive from plaintiff as compensation for his services the sum of not less than Seventy-five ($75.00) Dollars per week.

6. On June 30, 1951, defendant terminated his employment with plaintiff without cause and without giving plaintiff any notice of such termination either orally or in writing. [23]

7. By reason of defendant's failure to notify plaintiff of defendant's termination of his employment, plaintiff was damaged in its business.

8. During the period of defendant's employment by plaintiff, defendant did not render his services exclusively to plaintiff but did solicit business on his own account and in competition with plaintiff and defendant did make and sell stringed instruments and defendant kept the proceeds of such sales without accounting therefor to plaintiff.

9. During the period of employment of defendant by plaintiff, defendant appropriated goods and materials belonging to plaintiff, which goods and materials defendant fabricated into stringed instruments without the knowledge or consent of plaintiff, as a result of which plaintiff suffered damage.

10. It is not true that plaintiff and defendant in executing the written agreements of employment hereinabove found to have been executed were done so by plaintiff and defendant with the intention that such agreements were not to be binding upon either of the parties.

11. It is not true that defendant worked for plaintiff at any time during his period of employment involuntarily and without his consent.

12. It is not true that plaintiff instructed defendant to create and insert false, fraudulent and/or misleading labels into inferior, cheap, factory-made violins for the purpose of enabling plaintiff to deceive the public.

13. It is not true that plaintiff instructed defendant to falsely appraise in any manner or by any means any musical instruments or to commit any act

to deceive or tending to deceive the public or plaintiff's customers.

14. By reason of defendant's wrongful termination of his employment with plaintiff, plaintiff has suffered general [24] damages to his business in the sum of Three Thousand ($3000.00) Dollars.

15. By reason of the defendant's wrongful breach of the contract sued upon herein, plaintiff has suffered special damages in the sum of Two Thousand Seven Hundred and Fifty ($2750.00) Dollars.

Conclusions of Law

1. This Court has jurisdiction to hear and determine the issues in this cause.

2. The defendant wrongfully terminated his employment by plaintiff in breach of the parties' written agreement with respect to such employment and said termination by defendant was without cause and without notice.

3. As a direct and proximate cause of the defendant's breach of the contract between the parties, plaintiff suffered general damages in the amount of Three Thousand ($3000.00) Dollars and special damages in the amount of Twenty-seven Hundred and Fifty ($2750.00) Dollars, for which the plaintiff is entitled to judgment of this Court.

4. Plaintiff is entitled to recover from defendant its costs of suit.

Dated this 25th day of March, 1955.

/s/ LEON R. YANKWICH,
Judge of the District Court.

Affidavit of Service by Mail attached.

Lodged March 18, 1955.

[Endorsed]: Filed March 25, 1955. [25]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16770-Y

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial in the within Court on the 9th day of March, 1955, before The Honorable Leon R. Yankwich, Judge presiding and sitting without a jury in and for the Southern District of California, at Los Angeles, California, the plaintiff having been represented by Schwartz & Alschuler, by Benjamin F. Schwartz, Esquire, and the defendant having been represented by Sydney S. Finston, Esquire, and the Court having heard the testimony of the witnesses for the plaintiff and the defendant having testified

in his own behalf, and the Court having examined the documentary evidence introduced, and having heard argument of counsel,

It Is Ordered, Adjudged and Decreed That:

1. Plaintiff have and recover from the defendant as and for its general damages herein the sum of Three Thousand ($3000.00) Dollars;

2. Plaintiff have and recover from defendant as and [27] for its special damages the sum of Two Thousand Seven Hundred and Fifty ($2750.00) Dollars;

3. Plaintiff have and recover from defendant as its costs of suit the sum of $.....;

4. Let execution issue.

Dated: This 25th day of March, 1955.

/s/ LEON R. YANKWICH,
Judge of the District Court.

Affidavit of Service by Mail attached.

Lodged March 18, 1955.

[Endorsed]: Filed March 25, 1955.

Docketed and entered March 29, 1955. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Kagan & Gaines Co., Inc., a Corporation, and to Schwartz and Alschuler, Attorneys:

Please take notice that the Defendant, Alfio Batelli, hereby appeals to the Court of Appeals for the

Ninth Circuit from the Judgment entered herein on the 29th day of March, 1955, in favor of the Plaintiff, and against the Defendant, and from the whole and every part of said Judgment.

Dated: This 28th day of April, 1955.

/s/ SYDNEY S. FINSTON,
Attorney for Defendant.

[Endorsed]: Filed April 28, 1955. [30]

In the United States District Court, Southern District of California, Central Division

No. 16,770-Y Civil

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

Hon. Leon R. Yankwich, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
SCHWARTZ & ALSCHULER, ESQS., By
BENJAMIN F. SCHWARTZ, ESQ.,
9441 Wilshire Boulevard,
Beverly Hills, California.

For the Defendant:
SYDNEY S. FINSTON, ESQ.,
1680 North Vine Street,
Hollywood 28, California.

Wednesday, March 9, 1955—10:00 A.M.

The Court: Cause on trial.

The Clerk: Case No. 16,770-Y, Kagan & Gaines Co., Inc., vs. Alfio Batelli. Mr. Benjamin F. Schwartz for the plaintiff, and Mr. Sydney S. Finston for the defendant.

The Court: All right, gentlemen, proceed.

Mr. Schwartz: Your Honor, I observe that the defendant and cross-complainant is not in court, and I think we are entitled to have him present.

The Court: I don't know. Did you issue a subpoena to him?

Mr. Schwartz: No, sir.

The Court: Then proceed with your case.

Mr. Schwartz: Very well.

The Court: Of course, the defendant presumably, especially where there is a cross-complaint, is required to be in court, but if he chooses not to be, why, all right. If you want to call him as an adverse witness, I will make the proper order that he be produced.

Mr. Schwartz: I do so ask.

The Court: Let's proceed, and let's not start your case in a lopsided manner by calling the defendant under 43(b), and getting his testimony first, before I hear the main case in chief. Put on your case

in chief by your own witnesses [2*] or depositions, or whatever you have, and when we get the defendant, we will take care of it. I am bearing in mind that the case was continued with the object of securing some depositions, and we will see what the defendant intends to do at the present time. It was continued at the request of the defendant on the ground that they had to take some depositions, or had to have the presence of a special witness, so I assume that the representation was correct and that they were in good faith in asking for the continuance. Maybe they have changed their minds. I don't know. Let's go on. We continued the case yesterday to accommodate counsel. Counsel is here now, so let's start the case, gentlemen.

Mr. Schwartz: The complaint in this action, your Honor, sets forth the contract which is being sued upon.

The Court: Yes.

Mr. Schwartz: And the contract is admitted.

The Court: Yes, I remember the case. This case is similar to the case that was tried before, and it developed at the trial that the contract on which the suit was brought was modified, according to the evidence, and I made a finding to that effect, and gave judgment upon that ground only. I limited myself to the particular facts. Now, I assume you have brought suit under the substituted contract as the facts developed in that case.

Mr. Schwartz: Yes, your Honor. At this time I want to [3] introduce the deposition of Mr. Robert

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Kagan, taken in Chicago, on December 9, 1954, pursuant to notice.

Mr. Finston: I object, your Honor, to the admission of that deposition. I would like to have an opportunity to object to portions of it.

The Court: I do not receive it in toto. The deposition may be received and marked, but it will have to be read unless there is a waiver. Furthermore, in a case of this character I think we might just as well read the questions and answers rather than have you just give it to me and expect me to read it between sessions. If a case is long, I sometimes do that, but I have other things to do between sessions. So the deposition will be received, but the questions will be read and any objections you desire to make will be made.

Mr. Finston: Did you say, your Honor, that the deposition will be received in evidence?

The Court: That is right.

Mr. Finston: Well, I would like to note my objection to its receipt in evidence on the ground that no foundation has been laid for it, and I want the opportunity to object to practically every question in the plaintiff's deposition, in accordance with the Federal Rules of Civil Procedure, Rules 32 and 26.

The Court: I haven't seen the deposition. What is the objection? [4]

Mr. Finston: I am calling your attention, your Honor, please, to Rule 26, subparagraph (e), which reads as follows:

> "Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made

at the trial or hearing to receiving in evidence any deposition or part thereof * * *"

The Court: But that is not the particular point. Let's see how the deposition was taken. Was it taken upon notice?

Mr. Schwartz: It was taken upon notice, your Honor.

The Court: Let me take a look at it.

(The deposition was handed to the court.)

Mr. Finston: May I ask counsel whether this is the deposition that was taken in this case? Is this the deposition that was taken on December 9, 1954, that you are referring to?

Mr. Schwartz: Yes.

Mr. Finston: Thank you, sir.

The Court: Now, what is your objection to this deposition? This seems to be taken on proper notice. It is a deposition of a party, and is more than 100 miles away. I take judicial notice that Chicago is more than 100 miles away from here. Your objections to the specific questions will be considered.

Mr. Finston: But, your Honor, I want the whole deposition not to be received in evidence at this point for the simple reason that I want an opportunity to object to each and [5] every one of these questions.

The Court: I have to make an order identifying the deposition and giving it a number in order to make it a part of the record, but I am reserving to you the right to object to each question as it is asked.

Mr. Finston: Then let the deposition be for identification purposes only, and not to be received in evidence at this point.

The Court: All right.

Mr. Finston: If counsel wants to have it identified, I have no objection, but I have complete objection to the receipt in evidence.

The Court: All right. Change your offer and just say you want to read the deposition, and I will allow you to read the deposition. The record will show that the deposition was taken on notice duly given to the parties, and that no one appeared on the part of the defendant. The certificate of the notary so states, so the deposition may be read.

Under what particular subdivision of the rules did you raise your objection?

Mr. Finston: I have raised my objection under several of the rules, and I refer you first, your Honor, to Rule 26, subdivision (e). May I read it, sir?

The Court: I have it in front of me.

Mr. Finston: In addition to that, the objection is also [6] made under Rule 32.

The Court: 32?

Mr. Finston: Subdivision (c).

The Court: 26 (e) merely says that if the evidence is not proper, the objection may be made to all the questions, but I don't know upon what theory the evidence of a litigant, a plaintiff, is not proper in a lawsuit.

Mr. Finston: How could we determine, your

Honor, whether it is proper or not unless we hear the questions?

The Court: That is right. I am giving you that, but I mean your omnibus objection is not good.

Mr. Finston: Your Honor, I am only objecting to the receipt of the whole deposition in evidence, and I think the objection is good.

The Court: All right.

Mr. Schwartz: I think for the sake of continuity here at this time, I will offer to read in evidence the deposition.

The Court: I think that is better. Then we will understand each other. I think we are talking at cross-purposes. Counsel starts with a chip on his shoulder this morning. I don't know why, when we have been waiting for a whole day on him, and he starts in in a fighting mood when no one has raised a voice as yet. So I think we will do it that way. I did not intend to put it in as a whole, because I said specifically that each question could be objected to. [7]

However, to avoid an omnibus objection which is not good, because there is no reason stated which shows that the deposition of a party cannot be received at any time, reframe your offer, and offer to read the deposition.

Mr. Schwartz: I offer to read in evidence, your Honor, the deposition of Mr. Robert Kagan on behalf of the plaintiff, which deposition was taken on December 9, 1954, and which deposition was taken on notice.

The Court: Put in the date of the notice and what was stated by the notary. Just read what was given. If counsel is going to become technical, I will become technical, too.

Mr. Finston: Your Honor, I am going to waive the formality.

The Court: No, I will not allow you to waive it. Not now.

Mr. Finston: My objection, sir, was not to the formality.

The Court: Listen, I have ruled upon the objection, and the whole thing will be read now, with the certificate and everything.

Mr. Schwartz: May I have the original deposition, your Honor?

The Court: Yes. The seal will be broken, and the original deposition will be used.

Mr. Schwartz: May I at this time, your Honor, also offer to read in evidence the testimony of the same witness, Robert [8] Kagan, which was taken by deposition in Chicago on February 5, 1954, pursuant to notice?

Mr. Finston: I am sorry, sir.

The Court: Let's have one at a time. Let's read the first one first.

The Clerk: Has it been filed already?

Mr. Schwartz: I will read it from the copy. That is all right. Don't bother.

The Court: There are two cases of the same name. It may well be they were filed in the other case.

Mr. Schwartz: "Robert Kagan, a witness, called in plaintiff's behalf,"——

Mr. Finston: May I interrupt, your Honor? May I have the very first page read?

The Court: Yes.

Mr. Schwartz: (Reading):

"In the District Court of the United States, in and for the Southern District of California, Central Division

"No. 14787 T

"KAGAN & GAINES CO., INC., a Corporation,

"Plaintiff,

"vs.

"ALFIO BATELLI,

"Defendant. [9]

"Continued deposition of Robert Kagan,"——

Mr. Finston: Just a moment. I object to the use of the word "Continued," the first word in the deposition.

Mr. Schwartz: I will stipulate to strike the word "Continued."

Mr. Finston: Thank you.

Mr. Schwartz (Continuing):

"——on behalf of plaintiff, was taken at the office of Manuel J. Robbins, 39 South LaSalle Street Chicago, Illinois, at the hour of ten o'clock a.m., on December 9, 1954, pursuant to Notice, before Rose

Finsky, a Notary Public in and for the County of Cook and State of Illinois.

"Present:

"SCHWARTZ and ALSCHULER, By
"MR. MANUEL J. ROBBINS,
"Appearing for Plaintiff:

"No one appearing for defendant.

"ROBERT KAGAN

"a witness, called in plaintiff's behalf, being first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Robbins:"——

The Court: I think the record should also show that after notice of the taking of the deposition was given, the [10] defendant filed a motion on November 26th to vacate the notice, and also a request that the deposition be taken on interrogatories; that the motion was heard by this court, and was denied, and the court ordered the deposition to be taken orally and not by interrogatories. I just wanted to make the record straight.

Mr. Schwartz: Thank you, your Honor. (Continuing reading):

"Q. Will you state your name, please?

"A. Robert Kagan.

"Q. You are the same Mr. Kagan who is the plaintiff in this case?

"A. Yes, sir.

"Q. And are you the same Mr. Kagan who pre-

(Deposition of Robert Kagan.)

viously testified in a deposition on behalf of the plaintiff taken at ten o'clock a.m., on February 5, 1954?"

Mr. Finston: Just a moment. I am going to object to that question as being immaterial, irrelevant and incompetent. I don't know what the question means. The question is whether this man is the same Mr. Kagan who previously testified in a deposition on behalf of the plaintiff taken more than a year ago.

The Court: The objection is overruled. It is an identification question only.

Mr. Schwartz (Continuing reading): [11]

"A. Yes, sir.

"Q. You are now appearing for a further deposition pursuant to a Notice sent by attorneys Schwartz and Alschuler, from California?"

Mr. Finston: I am going to object to that question on the same ground. I don't know what the expression "further deposition" means. There was only one deposition taken.

The Court: The objection is overruled.

Mr. Schwartz (Continuing reading):

"A. Yes, sir.

"Q. You previously testified that a contract of employment was prepared for you between Kagan & Gaines Co., Inc., and Alfio Batelli, the defendant, on or about June 1, 1950, is that correct?"

Mr. Finston: Just a moment. Now, I am going to object to that question as being immaterial, irrelevant and incompetent. It deals with some con-

(Deposition of Robert Kagan.)

tract that is not at all within the issues of this case. It has absolutely no bearing on the issues of this case, and it is totally immaterial.

The Court: The objection is overruled.

Mr. Schwartz (Continuing reading):

"A. Yes, sir.

"Q. What were the events leading up to it?"

Mr. Finston: I object to that question, your Honor, for the same reasons. The question deals with a contract not [12] in suit.

The Court: The objection is overruled. The record in the prior case shows that there were negotiations carried on, and one contract was substituted for the other. In fact, counsel now overlooks the fact that he was the one who brought in the question of the contract that had been abandoned, and that he won the case on that point. I don't want any argument. I am making a statement for the record.

Mr. Schwartz: May I state further for the record, your Honor——

The Court: I beg pardon?

Mr. Schwartz: I should like to state further for the record that when Mr. Batelli's deposition was taken by me, pursuant to—I don't recall now whether stipulation or notice, but he was represented by Mr. Finston at that deposition in my office on April 10th——

The Court: Just a minute. Let's not go into that. There may be good grounds for objecting to bringing in the contents of the other deposition. You may ask the witness whether on certain other

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occasions he so testified, in order to shorten or to point up the question about which you are talking.

I am merely ruling on the facts. I take judicial notice of my own acts. A previous action was brought and was decided in favor of the defendant on a point raised at the time that [13] the contract sued on was abandoned, and another one was substituted.

In view of that fact, of which I take judicial notice because my findings so state, it is material and proper in a case of this nature to show the transactions, and to show what happened to these contracts in the course of their dealings.

That is all I am ruling on. I am not ruling at the present time on anything else, and I don't know how much of the other you are bringing in.

Mr. Finston: Well, your Honor also takes judicial notice of the fact that the prior lawsuit is a matter which was completely adjudicated and a thing of the past.

The Court: That is true, but I am talking about the facts that the evidence disclosed, and the findings so state. Get the other file, and let me have the other file before me. This is a perfect illustration that if you try to give a lawyer a victory upon a narrow ground, he is not satisfied. What I should have done was to allow them—I am sorry now I didn't—to change their pleading, and then you would have had one lawsuit.

Counsel having won it, now he wants me to disregard the file and what was done in the other case

(Deposition of Robert Kagan.)

upon some new theory he may have, which may be correct. But let's get back to the findings in the other case. I wrote those findings [14] myself because I wasn't satisfied with what counsel for either side had produced, and I rewrote them, and I made findings strictly limited to the issue upon which I found.

Here are the original findings. The entire thing was rewritten, and we will see what was found. As I say, the findings were rewritten, and on Government paper, and I wrote them myself, and this is what I find. I am reading from the findings in Case No. 14787-Y, filed on May 5, 1954, paragraph 5:

"On June 1, 1950, Plaintiff and Defendant entered into a written employment agreement, the terms of which were as follows:"

And then I give the terms of the agreement.

"6. On or about June 10, 1950, Plaintiff and Defendant by mutual agreement terminated the agreement of June 1, 1950. The evidence in the record is incomplete and insufficient to warrant the conclusion that the said agreement was or *was not* replaced by another agreement dated June 10, 1950, and/or whether such new agreement was in force at the time of the termination of the employment by the defendant or at the time when this action was instituted.

"For these reasons the court makes no finding on this issue."

So that this very specifically shows that a [15]

(Deposition of Robert Kagan.)

certain agreement was abandoned, and the object of this inquiry is to show what was done after that.

Mr. Finston: Your Honor, may I at this point say something?

The Court: Yes.

Mr. Finston: May we have the file of the previous case introduced into evidence as Defendant's Exhibit 1?

The Court: It may be introduced at the proper time. The file is here.

Mr. Finston: All right. Thank you.

The Court: You haven't presented your case yet, and this is not cross-examination. You cannot cross-examine a deposition.

Mr. Finston: No, sir; except your Honor has been reading from the findings, and I am merely asking that the entire file be introduced in evidence by reference.

The Court: At the proper time, if you want it, it will be. I take judicial notice of my own file, and the file is right here. I had the clerk bring it in.

Mr. Schwartz: Lest Mr. Finston be concerned about it, I will offer by reference the file of the previous case.

The Court: All right. Then the file may be received as Plaintiff's Exhibit 1.

(The file referred to was marked Plaintiff's Exhibit 1, and was received in evidence by reference.) [16]

(Deposition of Robert Kagan.)

Mr. Schwartz: I am reading at the top of Page 3:

"A. I told Mr. Batelli that I was spending an awful lot of money and time"——

Mr. Finston: Counsel, would you mind telling me the page and line?

Mr. Schwartz: Yes, the top of Page 3. It is the answer to the question, "What were the events leading up to it?"

Mr. Finston: I made an objection to that question, your Honor.

Mr. Schwartz: It was ruled on.

Mr. Finston: I don't know whether the court ruled on the objection or not.

The Court: I overruled it.

Mr. Schwartz (Continuing reading):

"A. I told Mr. Batelli that I was spending an awful lot of money and time and making many efforts to make him an American citizen and that if he did not intend to stay I did not want to do all this. I asked him if I did spend all this time and money to make him an American citizen whether he was prepared to sign a contract with Kagan & Gaines Co., Inc., for a period of at least five years.

"He answered that he was very grateful for everything that I was doing for him, that he would work for me for the rest of his life, not only for five years. [17]

"Q. Was a contract of employment ever prepared for Mr. Batelli to be employed by Kagan & Gaines Co., Inc.?

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"A. Yes, sir.

"Q. About when was it prepared?

"A. The last part of May or early June, 1950."

Mr. Finston: Just a moment. If the Court please, as to the last question, "About when was it prepared," may I understand whether the contract pertains to the contract involved in this suit, or the contract involved in the previous suit?

Mr. Schwartz: Let's go on with the examination.

Mr. Finston: Well, if the question pertains to the contract involved in the previous suit, I will object to the question as irrelevant, immaterial and incompetent, and having no bearing whatever under the pleadings.

The Court: The objection is overruled. I have already indicated that the findings in the previous suit showed that there was a contract, and there were modifications, and the object of this inquiry is to supply the very thing that I referred to that was not present there, and that the evidence was uncertain as to what happened to that. That is the finding I made in the case. As I said, I think I made a mistake. I should have allowed the pleadings to be modified, and the case to have gone on, but because we were in the midst of trial, and because I felt we should not take the time to do it we have a second lawsuit, and counsel raises these objections, [18] which he has a right to do, but I also have the right to say that in view of the findings in the prior case the inquiry is absolutely material, because otherwise we will be just as much up in the

(Deposition of Robert Kagan.)

air as we were last time, where I merely found that that contract was abandoned because there wasn't enough evidence to show what became of it.

I still believe in the Rules of Procedure, but sometimes it is not advisable, as this case demonstrates, to decide a case strictly on procedural grounds, as I did the other case. I am sorry now I did it. However, this case is here, and we will hear it on the merits. And we have a cross-complaint, which we did not have in the other case, if I remember correctly. Am I correct on that?

Mr. Finston: Yes, your Honor.

Mr. Schwartz: Yes, your Honor, you are. (Continuing reading):

"Q. What took place at that time?

"A. A bill was presented to Congress through my efforts by Mr. Gold—through my efforts and the efforts of Mr. Gold, the attorney, making Mr. Batelli a citizen. It was to be enacted by Congress and signed by the President. I then had Mr. Gold prepare a contract as per my agreement with Mr. Batelli. I told Mr. Batelli to take the contract home and look it over and study it. He did and came back the next morning and told me that [19] everything was all right and he signed it and gave it to me.

"Q. Was this signed in your presence?

"A. Yes.

"Q. Did this contract provide for any termination provisions?"

Mr. Finston: Just a moment. I object to that

(Deposition of Robert Kagan.)

question as irrelevant, immaterial and incompetent. The contract speaks for itself.

The Court: That is all right. The witness may be examined in regard to a particular clause. I agree that the contract speaks for itself, but the attention of the witness may be called to a particular clause in order to follow it up by other questions. Go ahead. Overruled.

Mr. Schwartz (Reading):

"Q. Was this signed in your presence?

"A. Yes.

"Q. Did this contract provide for any termination provisions?"

Did I read that?

Mr. Finston: I think you had already read that.

Mr. Schwartz (Reading):

"A. Yes. He was supposed to give me ninety days notice prior to expiration of the contract.

"Q. Now, was this the first contract that you executed? [20] A. Yes, sir."

Mr. Finston: Just a moment. I want to object to that on the same ground, that it is immaterial, irrelevant and incompetent and not within the issues framed by this case.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. Yes, sir.

"Q. Did this contract remain in effect?"

Mr. Finston: Just a moment. I am going to object to that question as calling for the witness' opin-

(Deposition of Robert Kagan.)

ion and conclusion. No witness is in a position to know whether any contract remains in effect.

The Court: The objection is overruled.

Mr. Schwartz (Reading):

"A. No, sir.

"Q. Did you have any discussion with Mr. Batelli? A. Yes, sir.

"Q. About when did you have the discussion?

"A. A day or two after the contract was executed and signed by both of us.

"Q. Who was present at that time?

"A. Mr. Batelli and myself.

"Q. Where did this conversation take place?

"A. In my office.

"Q. What did you say and what did he say, if anything? [21]

"A. I told Mr. Batelli I have had a chance to think about this contract carefully and to think about the great expense and effort that I exerted in bringing you to this country and arranging for you to stay here and also the great amount of money that I have spent and that I am going to spend in advertising you and I feel that a ninety-day notice of termination is not much protection to me, and whereas he professed to be willing to work for me for the rest of his life, I thought he would have no objection to signing a contract for a 365-day or a one-year termination clause instead of a ninety-day termination clause.

"Q. What, if anything, did Mr. Batelli say?

"A. He said, 'I am only too glad to change the

(Deposition of Robert Kagan.)

contract because I will never forget what you have done for me and you treated me like a brother and I am willing to work for you for the rest of my life.'

"Q. What, if anything, did you do at that time?

"A. I have asked Mr. Gold to prepare another contract which was exactly the same like the first one except with the change of the termination clause."

Mr. Finston: Just a moment. I am going to object to that question and answer on the ground that it is not the best evidence. The contracts speak for themselves. The question asks the witness for his opinion and his conclusion. [22]

The Court: The objection is overruled. Of course, the new contract will have to be put in evidence, but the fact that such contract contained the clause that they were discussing in connection with it may be testified to. Overruled. Go ahead.

Mr. Schwartz (Reading):

"Q. What did this termination clause contain?"

Mr. Finston: I object to that question, your Honor, on the ground the contract speaks for itself, and this is not the best evidence as to what is contained in a writing.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. This termination clause provided 365 days notice instead of 90 days notice. I received this contract from Mr. Gold. I called in Mr. Batelli in the office and he compared this contract with the contract which he signed a week or so previous and

(Deposition of Robert Kagan.)

found everything satisfactory and he signed the new contract."

Mr. Finston: Just a moment. I am going to object to that whole answer because it is all not responsive to the question. The question is, "What did this termination clause contain," and we have a whole story.

The Court: In the Federal Courts an objection that an answer is not responsive is not good. The Legislature of California has established such a rule, but on the civil side [23] we are not bound by that rule. Go ahead.

Mr. Schwartz (Reading):

"Q. Did you sign it also?

"A. I have also signed the contract.

"Q. Did he sign it in your presence?

"A. Yes, he signed it in my presence.

"Q. When was this contract executed?

"A. About the week after the first one, some time between the tenth and fifteenth of June, 1950.

"Q. I show you Plaintiff's Exhibit 'A' and ask you if that is an exact copy of it?

"A. Yes."

Mr. Finston: May I see that exhibit, please?

The Court: He has not offered it yet. Give the man a chance.

Mr. Finston: But I would like to know what the question pertains to.

The Court: Well, you are not allowed to see an exhibit until he offers it. Go ahead.

Mr. Schwartz (Continuing reading):

(Deposition of Robert Kagan.)

"Q. Now, was this contract ever changed in any way? A. No, sir.

"Q. Is this the contract upon which your present cause of action is based? A. Yes, sir. [24]

"Q. Is this contract in the same condition now as when you signed it? A. Yes, sir.

"Q. Was this contract in any way ever cancelled? A. No, sir.

"Q. Was this contract still in existence during June, 1951? A. Yes, sir.

"Q. Did Mr. Batelli ever repay you for any of the money that you advanced?"

Mr. Finston: Just a moment. The question is totally immaterial. There is nothing in the complaint which sues for any monies advanced by the plaintiff to the defendant.

The Court: I will sustain the objection.

Mr. Schwartz (Continuing reading):

"Q. Did Mr. Batelli work for you the five years as listed in the contract? A. No, sir.

"Q. When did he cease his employment with your Company?

"A. Approximately in June, 1951.

"Q. Did he give you any notice?

"A. None, whatsoever.

"Q. Will you please tell the court what, if anything, took place at that time? [25]

"A. Mr. Batelli came to my office and told me that instead of two weeks vacation he likes to take a longer time in order to go to Italy and bring his family to the United States and wind up his affairs

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in Italy, and of course, although it was quite a strain on our Repair Department, I have agreed for him to take a month off with two weeks pay and we have given him a farewell party and the two weeks pay, in our office. I also told him upon his arrival back I would get him a larger apartment if he will bring his family to this country and I will do everything possible to make his family comfortable.

"I made it very plain to him that he should not stay any longer than four weeks because we have on hand a large amount of unfinished work and work in process and work which would accumulate during the time he was gone.

"Q. What did he say?

"A. He said that I can depend upon his integrity, that he will be back maybe in three weeks, but the most it will take is four weeks as his family already sold some of their possessions and he has all the necessary affidavits and papers to bring them to this country and he will catch up with the accumulated work immediately upon arrival and he again thanked me innumerable times for all that I have done for him. [26]

"Q. Did he in any way mention that he was leaving your employment?

"A. No, sir.

"Q. Did you ever receive any communication from him?

"A. No, sir.

(Deposition of Robert Kagan.)

"Q. Have you ever heard anything at all from him since he left?

"A. No, sir. In fact, later on I found out he never even left this country.

"Q. He gave you no notice at all of quitting?

"A. No. While he is telling me he was making the trip to Italy, his wife was already here in Chicago.

"Q. Did he ever give you any notice that he was quitting?

"A. No.

"Q. Did he ever make any complaints about any working conditions whatsoever?

"A. Never.

"Q. In your previous deposition, Mr. Kagan, didn't you testify that another contract which was executed on June 1st was still in existence at the time Mr. Batelli left your employment?"

Mr. Finston: Just a moment. I certainly object to that question. I don't know what the question means. It is talking about a previous deposition. I know of no previous [27] depositions taken in this case. Anything testified to in the previous deposition is totally immaterial to the issues joined in the pleadings in this case, and no proper foundation has been laid for any evidence of previous depositions.

The Court: The objection is overruled. The object is merely to call attention to certain specific facts. The man is testifying specifically, and there is no portion of the previous deposition offered or

(Deposition of Robert Kagan.)

received in evidence. A witness who has given two depositions may be helped so as to make clear in his mind what is desired in this deposition. Go ahead.

Mr. Schwartz (Continuing reading):

"A. Yes, I did.

"Q. Can you explain to the court?

"A. I have completely forgotten that contract that we made a week later because it was the identical contract except the change of termination date provisions. I turned over all my papers to my attorneys and did not examine the fact that there was another contract made up between a week or ten days after the first one and I did not give it a second thought at that time. I had forgotten about the new contract with the 365-day provision.

"I still say, however, that that contract was signed a few days after the first one and that [28] it was in effect at the time Mr. Batelli left our employment and was never changed and was signed by each of us after a discussion about the termination provisions.

"Q. You brought this action against Mr. Batelli, did you not?

"A. Yes, sir.

"Q. What was your reason for bringing this action?"

Mr. Finston: Just a moment. I object to that question as calling for the witness' opinion and conclusion.

The Court: The objection will be sustained.

(Deposition of Robert Kagan.)

Mr. Schwartz: Your Honor, I think it relates——

The Court: What is that?

Mr. Schwartz: I think it would have reference to the cross-complaint, which alleges malicious prosecution as a ground for a cause of action. May I read the answer, subject to that objection?

The Court: Let's wait and let's see how much is going to be offered. The defendant is not here, and they may not produce him at all. They may rely upon some weakness in this case, as they did in the other, and not go on with the cross-complaint. I can't compel them to go on, so let's wait with that portion of the deposition until there is some evidence to sustain the claim that there was malicious prosecution. Go ahead.

Mr. Schwartz (Continuing reading): [29]

"Q. Now, everything else that you indicated in your previous deposition concerning the expenses that you incurred and concerning your damages, do you hereby affirm said answers?"

Mr. Finston: Just a moment. If it please the court, I object to that question.

The Court: I will have to sustain the objection.

Mr. Schwartz: I am going to offer that deposition anyway.

The Court: What is that?

Mr. Schwartz: I say I am going to offer that deposition anyway, when I get through with this one.

The Court: All right.

Mr. Schwartz: Under the rules, as is provided.

The Court: I don't think you can offer a deposition taken in another case.

Mr. Schwartz: I think, your Honor, under Rule 26(d)(3), the last paragraph.

Mr. Finston: What is that?

Mr. Schwartz: Or, rather, it is 26(d)(4).

Mr. Finston: 26(d)(4), Mr. Schwartz?

Mr. Schwartz: Yes. "* * * when an action in any court of the United States"——

The Court: Just a moment. That was 26 what?

Mr. Schwartz: 26(d)(4),—the last paragraph of (d)(4). [30]

Mr. Finston: Is that the one beginning with the word "substitution"?

Mr. Schwartz: Yes.

The Court: Will you give me the other file again?

(The file was handed to the court.)

The Court: Now, what is your objection?

Mr. Finston: I don't know that an objection is before the court. The last objection I made the court sustained.

The Court: No, they are offering now the entire deposition.

Mr. Finston: Which deposition?

Mr. Schwartz: The first one.

The Court: The first deposition, under this section, which states that when an action is dismissed the deposition may be used by the same parties.

Mr. Finston: Well, I make the simple objection that the deposition is completely inadmissible under

that rule. There is no previous action that has been dismissed here. The previous action was adjudicated on the merits. There are three cases that were decided under that particular rule which Mr. Schwartz has just invoked, and I would like to give the court the three citation of those three cases.

The cases are as follows:

Eller v. Mutual Benefit Health & Accident Association, and the citation is 1 Fed. Rules Decisions at Page 280. The [31] second case is Franzen v. DuPont, etc., and the citation on that one is 146 F. 2d at Page 837. And the third case is Cervin v. Grant, and the citation on that one is 100 F. 2d at Page 153.

Those three cases interpret the particular subdivision that Mr. Schwartz has now invoked. Under those three cases, which I have cited to the court, the previous action was always pending and undisposed of. The implication is clear that when a previous action is finally adjudicated on the merits, no deposition taken in that action either of the party or of a witness is admissible in a subsequent action. Otherwise we would lose our right to cross-examine the witness completely.

Under those three cases, your Honor, any deposition taken in the previous lawsuit is inadmissible.

The Court: Just a moment. Get me 146 F. 2d.

(The book was handed to the court.)

The Court: I don't find anything in this case. Get me these other two cases. I don't find anything

in this case. I don't find anything in the Franzen case. On the contrary, the court said a deposition taken in a prior proceeding before an administrative body was admissible.

Mr. Finston: That is correct, your Honor, but the prior proceeding was not completed, and, if I am not mistaken, if I remember the facts correctly, it was simply transferred to another court for continuation. It had never been finally [32] adjudicated.

The Court: This states:

"The testimony of the witness, Gordon, upon which the trial court largely relied for its findings pertinent to the question of marriage, was introduced at trial by way of a deposition. Gordon had given the deposition in connection with the plaintiff's claim before the Workmen's Compensation Board of New Jersey for compensation under the law of that State for her husband's death. It was so used and became a part of the record in that proceeding to which we have already referred in another connection."

Then they go on and say that that was available for use.

Now, let's look at the other case. In the other case, Eller v. Mutual Benefit Health & Accident Association, the case was still pending.

Let's see what this case in 100 F. 2d says. This Cervin v. Grant does not help much because there the deposition was taken while the case was pending in the State Court, under State rule, and the

only question before the court was whether that deposition was good, and the court held that it could be used.

Mr. Schwartz: Your Honor, I would like to suggest here that this objection probably is no good for the simple reason that I offered in evidence by reference the file in the previous [33] action, and there was no objection made, and the depositions are a part of the file in the previous action, your Honor.

The Court: Of course, technically speaking, the other case terminated in a judgment for the defendant. It was not dismissed. The question then arises if that deposition is admissible at the presen time in view of the fact that the section does say that depositions may be used in those instances.

Mr. Schwartz: My point is in the first case that by judgment the action was dismissed, but, secondly, and the rule here does not say how it shall be dismissed, whether by judgment or a motion. In any case, whether it be by judgment or a motion, there is a judgment of the court, whether based upon a motion, or otherwise, or on findings, but the action has been dismissed, not by the plaintiff for any reason, but by the court's action. The rule itself is open on that. It says, "When an action in any court of the United States or of any state has been dismissed * * *"

The Court: Of course, technically speaking, there was no dismissal because the judgment says that the plaintiff take nothing. It was adjudi-

cated, and said that you were not entitled to recover.

Mr. Schwartz: My point is that I have offered in evidence the file of the previous action by reference, and the depositions are a part of the [34] file.

The Court: The rules of evidence prescribe that we ought to follow the rules which favor admissibility. In view of the fact that the defendant here was given an opportunity to appear, and did not appear at that time, I am going to rule in favor of the admissibility of the prior testimony. There is no rule to the contrary, and not one of these cases are decisive. So there is an opportunity here to have the question ruled on in the Ninth Circuit.

Mr. Finston: I respectfully except to your Honor's ruling.

The Court: You do not have to except to it. I have ruled, and every ruling on evidence is deemed to be excepted to. That has been the rule since 1938, when the rules were promulgated. I will read you the section.

So long as you are becoming technical, I will read you the section which says that exceptions are abolished. Your client not being present, I assume you are not making this for effect on him, but to show that you are making a record.

Now, just a moment. Let's find out. We are getting to be very technical today, so we will follow that procedure. Let's see where the rule as

to exceptions is, and we will read it, and you will see that it is not necessary. Rule 46 says:

"Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes [35] for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Of course, that is the original rule, and it has never been changed. But exceptions to admissibility of evidence are not necessary. If they were necessary, then you are about fifty exceptions behind, because this is the first one you have taken, and you have already had about fifty objections. So I do not want you to be in the position where you are taking the exception the fifty-first time, where you did not take it the first time.

However, the exception will be noted, although it is unnecessary.

Now, let's take a short recess before we go on.

(A short recess.)

The Clerk: Your Honor, before we go on, the former deposition was filed in the other case, and shall we make that as a part of the file in this case as an exhibit?

The Court: No, it is not being offered as an

exhibit. You may give it a number for identification. [36]

The Clerk: Plaintiff's Exhibit No. 2, for identification.

(The deposition referred to was marked Plaintiff's Exhibit 2, for identification.)

The Court: We are not admitting it in toto. Counsel would still have the right to object individually to some of the questions asked, as he has as to the others.

Mr. Finston: May I ask if I understand correctly, the depositions in the previous case have not been admitted in this case as an exhibit?

The Court: No, counsel is going to proceed to read the questions, as he did in the other, and you may have objections to the questions. I have, however, ruled that it is permissible to use it. That is all I have ruled on, that he may use that deposition, or portions of it, as he chooses.

Mr. Finston: I might also say, to clarify the record, if I may, at the time something was said about introducing the file in the former case by reference into this case, it was done when your Honor was reading the findings in the previous case, and the offer was made for the purpose of having the findings in the other case appear in the instant case.

Mr. Schwartz: I made no such stipulation when I offered it.

The Court: I don't think that is material. I have stated the ground. If there are other grounds

on which the ruling may be sustained, such, for instance, as the offer of [37] the file, while those may be available, I am satisfied on the whole that the interests of justice will be best subserved by allowing these questions rather than by excluding them, in view of all of the circumstances that have already been alluded to. I don't want to repeat them.

Mr. Finston: I would like at this point, your Honor, to make the general objection, that the objection to the introduction of the depositions taken on the previous case is on the ground they are all inadmissible and hearsay, and no foundation has been laid for their admission, or any part of them, and I have never had the opportunity to examine or cross-examine in connection with them.

The Court: You chose to absent yourself from the second deposition, at which this question relating to the other was asked. The witness was asked if his damages are the same as given in the other, and I think where the person is not present, that is an objection as to form, and it is as though he had presented the man in summary with the prior testimony as to damages, and said, "Is this correct?" You were not there. That is a question as to form, and the witness may be asked.

As a matter of fact, the Ninth Circuit Court of Appeals has approved the method whereby if you have extensive accounts, you may present a summary and ask the person if that summary correctly reflects what is in the books.

At any rate, I have made the ruling, and I will allow [38] counsel to read from the prior deposition,

subject to individual objections to the questions, as you desire to make them.

As I said, the rules enjoin upon us to favor rules of evidence which allow matters to be gone into, and I know actually of no case since 1938, when the rules went into effect, where a judgment has been reversed on purely a question of evidence. There are some—I could refer to one or two—but those are borderline cases where the balance swung either one way or the other, and the court felt that in the circumstances the admissibility of certain testimony should not be allowed, especially when there was a jury. But I know of no case tried without a jury in which there has been a reversal by the higher court, even upon an erroneous admission.

I am reminded of a statement made by Judge Wilbur in the first three-judge case in which I sat with him, which was an equity case, where objection was made to the introduction of testimony, and he said that the rule is that in equity we will only be governed by evidence that is material. And Judge Garrecht, in a decision he wrote just before he died, said that the new rules carried over into all civil litigation the same rule that applies in equity.

At any rate, I am willing to take a chance on this ruling, should it be reviewed. I thought the point counsel made had the appearance of merit, but the cases he cites are not decisive, and I think there are other reasons why the [39] objection should be overruled. However, I will reserve the right to counsel to object to each question as the question is repeated.

Go ahead.

Mr. Schwartz: This is at the bottom of Page 10, and the answer is:

"A. Yes, sir, they are exactly so.

"Q. In other words, Mr. Kagan, if you were asked those questions"——

Mr. Finston: Now, just a moment. You are reading an answer that the court ruled out. The answer which you just read was ruled out by the court.

The Court: What question?

Mr. Finston: Would you be good enough, then, to read us the question before reading the answer? You started out by saying, "Yes, sir, they are exactly so." That is the answer.

Mr. Schwartz: Mr. Finston, I had started out before to state the question which had been ruled upon before the recess, and now I am reading the answer.

The Court: Read the question again.

Mr. Schwartz (Reading):

"Q. Now, everything else that you indicated in your previous deposition concerning the expenses that you incurred and concerning your damages, do you hereby affirm said answers?" [40]

That was the question that was objected to and ruled on.

Mr. Finston: And I heard the court say, "The objection is sustained."

The Court: No. If I did that, I have been wasting my breath now.

Mr. Finston: I have the note here, your Honor.

The Court: All right. If I said so, I will say it was what we were taught in rhetoric is a lapsus linguae. I did not mean to sustain the objection, so now it will be overruled.

Mr. Schwartz (Reading):

"A. Yes, sir, they are exactly so.

"Q. In other words, Mr. Kagan, if you were asked those questions as indicated in that deposition, would your answers still be the same?"

Mr. Finston: Of course, I have got to object to that question for the same reason, that it is immaterial and hearsay—inadmissible hearsay.

The Court: Overruled.

Mr. Finston: And all the objections previously made.

The Court: Yes. The objections are overruled. I will add further that the court is of the view that in view of the witness' previous testimony, he may be so asked, especially when it relates to amounts of money, and may be asked the general question for the reason that the other side has not availed itself of the opportunity of being present, so it [41] cannot be heard to object that it should be gone into in detail. That is a matter for cross-examination, and is a matter also for objection on the part of the defendant, who did not choose to be present.

Mr. Schwartz: The answer to that question is, "Yes, sir."

Now, counsel at that time offered in evidence as Exhibit A the contract between Kagan & Gaines Co., Inc., and Alfio Batelli. I do not find that docu-

ment with the deposition, and, therefore, your Honor, I am going to offer instead——

The Court: Show counsel that you are referring to the same. If it is the same document, it does not make any difference whether it was identified by the deposition or not. I find that many deposition notaries are rather careless in matters of that character. I don't know whether it is the fault of the attorneys, who are rather easy-going in their methods, or the fault of the notaries. At any rate, you may show counsel the document you seek to offer.

Mr. Schwartz: I am going to offer in evidence as the plaintiff's next exhibit the contract which was identified by the defendant at the previous hearing, as the contract which is herein now being sued on.

The Clerk: As Defendant's Exhibit B?

Mr. Schwartz: The next exhibit.

Mr. Finston: I am going to object to this document as being irrelevant, immaterial and incompetent. [42]

The Court: Overruled.

The Clerk: It is marked No. 3, your Honor, and received in evidence?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

The Clerk: And it was Defendant's Exhibit B in Case No. 14,787.

The Court: All right.

Mr. Finston: Now, I am sorry, I was examining this document at the time I think counsel attempted to offer another document. Is that correct?

Mr. Schwartz: No.

Mr. Finston: Did you attempt to offer the other contract in the previous case?

Mr. Schwartz: No, this is the contract here, Mr. Finston.

The Court: No, the contract that he is talking about. This is the contract that the notary did not identify. However, the words of the witness show the date and the contract. That is where the preliminary examination of the witness helps in identifying the document, where the document for some reason is not identified by the notary.

Mr. Schwartz: As a matter of fact, a copy of this document——

The Court: Let's go on, gentlemen. It is nearly noon, so let's go on and make some progress. [43]

Mr. Schwartz: At this time, if the Court please, I will read from the deposition of Robert Kagan, taken on February 5, 1954, in Chicago, Illinois, pursuant to Notice, which deposition was taken in the case of Kagan & Gaines Co., Inc., v. Alfio Batelli, in Case No. 14787-T.

Mr. Finston: Your Honor, may I merely have an objection to the offer of this document on all the grounds previously stated?

The Court: Overruled.

Mr. Schwartz: "Robert Kagan, a witness, called in plaintiff's behalf,"——

The Court: Wait a minute. We are skipping one thing here. The contract has not been given a number yet.

The Clerk: Yes, your Honor, No. 3.

The Court: Oh, I beg your pardon. I didn't hear you, Mr. Stacey. Go ahead.

Mr. Schwartz (Reading):

"ROBERT KAGAN

"a witness, called in plaintiff's behalf, being first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Robbins:

"Q. Will you state your name?

"A. Robert Kagan.

"Q. Where do you live? [44]

"A. 3750 Lake Shore Drive.

"Q. Is that in Chicago, Illinois?

"A. Chicago, Illinois.

"Q. What is your business or occupation?

"A. I am the President of Kagan & Gaines Co., Inc.

"Q. Is that an Illinois Corporation?

"A. Yes.

"Q. Where is your place of business?

"A. 228 S. Wabash Avenue, Chicago.

"Q. How long have you been in business?

"A. Since 1926.

"Q. For how long?

"A. Twenty-eight years.

(Deposition of Robert Kagan.)

"Q. What is your business?

"A. Musical instruments, mainly stringed instruments, buying, selling, importing and repairing.

"Q. Now, approximately what is your gross business a year, what has it averaged?

"A. About $200,000.00.

"Q. Who do you cater to, who do you deal with?

"A. To professional musicians and schools, also Universities.

"Q. And dealers throughout the United States?

"A. Yes, sir.

"Q. What is your position with the firm? [45]

"A. I am the President of the Company.

"Q. In addition to that are you one of the main stockholders? A. Yes.

"Q. What percentage of the stock do you own?

"A. Ninety-nine per cent.

"Q. Now, what percentage of your business, approximately, comprises the repairs of musical instruments, stringed instruments?

"A. About twenty-five per cent.

"Q. So that normally during the year, your gross billings for repair of musical instruments would be approximately how much?

"A. About $50,000.00. However, this includes brass and wood instruments.

"Q. Approximately how much of this would be stringed instruments?

"A. About $25,000.00.

"Q. Now, approximately what markup is there.

(Deposition of Robert Kagan.)

what gross markup is there in regard to repairs of stringed instruments?

"A. About one-half profit.

"Q. What has your stringed instrument department been bringing you as far as profit is concerned?

"A. Between $12,500.00 and $13,000.00. [46]

"Q. How many employees have you averaged in your stringed instrument department, repair department?

"A. Between two and three, one bow repair man and two violin makers.

"Q. So then actually the ones who work on the instruments total two, is that correct?

"A. Yes, sir.

"Q. Two violin repair men? A. Yes.

"Q. When you say 'violins,' does that also include violas, cellos and basses? A. Yes.

"Q. Are you acquainted with the availabilty of violin and stringed instrument repair men in Chicago for the period of 1947 through and including 1950? A. Yes, sir.

"Q. What was the market at that time?

"A. Not only during this period, but at all times it is actually almost impossible to get even a fair violin maker available for employment.

"Q. That goes for violin repair men?

"A. Yes.

"Q. When you speak of a violin maker, you are also including violin repair men?

"A. Yes. [47]

(Deposition of Robert Kagan.)

"Q. Then would you say that they were very scarce during all that period of time?

"A. Extremely so. That is the only reason that the United States Government allowed us to import this labor from Europe.

"Q. Are you acquainted with one Alfio Batelli?

"A. Yes.

"Q. When did you meet him?

"A. I heard of him from inquiring of American soldiers who were our customers and who were stationed in Europe.

"Q. They had been in Italy, had these soldiers been in Italy? A. Yes.

"Q. They had told you about these men?

"A. I asked many of our customers when in Europe to look around for any violin maker or repair man, which is the same thing really, who would be willing to come to the United States and to work for our firm.

"Q. So you heard of this Alfio Batelli?

"A. Yes.

"Q. What did you do after you heard about him?

"A. I wrote him a letter and asked him whether he would be interested to come to the United States and work for our firm. [48]

"Q. Approximately when was this letter written; have you any idea?

"A. The latter part of 1946.

"Q. Did he answer you? A. Yes.

"Q. When did you receive the answer?

(Deposition of Robert Kagan.)

"A. I got his first letter immediately about a week or so after my first letter to him.

"Q. What did he say?

"A. That he was most interested to come to this country and actually pleaded with me to get him a permit to come to the United States.

"Q. What, if anything. did you do after hearing from him?

"A. I immediately contacted the Immigration Department in Chicago and engaged an attorney to expedite his arrival to the United States.

"Q. Did you hire an attorney at the time?"

Mr. Finston: Just a moment, Mr. Schwartz. Now, in addition to my general objections that the whole deposition is inadmissible as being inadmissible hearsay, as being irrelevant, incompetent and immaterial, and not being within any of the issues framed in these pleadings, I am going now to make a specific objection to this question, the question, "Did you hire an attorney at the time," because it is totally immaterial, [49] irrelevant and incompetent, and it has nothing to do with the prayer in the complaint, it has nothing to do with the statement of any cause of action, as to whether he hired an attorney for any purpose whatsoever, and whether he did or not would have no bearing at all upon any damages caused by the alleged breach of the contract.

The Court: The objection is overruled. This is an unusual situation, where a person imports somebody from another country under the laws which

(Deposition of Robert Kagan.)

permit certain artisans to be imported, and the nature of the contract, the fact that certain clauses were put in it which are not usual, becomes apparent if the facts are actually shown, that this man brought him here, that he was anxious to have him, and, later on, as already appears from the testimony in the case, even employed an attorney to make his temporary stay under a visitor's permit permanent. The court takes judicial notice of the fact that it is very rarely that a person is allowed to come in unless he comes in first on a temporary permit, unless he comes under the quota, so that all this bears upon the relationship between the parties, and the reason for the desire of both sides, evidently, so far as the court has been informed, to have a contract which was more lasting than the average contract. Overruled.

Mr. Schwartz (Continuing reading):

"A. Yes. [50]

"Q. Did you pay this attorney anything?"

Mr. Finston: I make the same objection to that question.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. Yes.

"Q. How much did you pay him?

"A. $300.00."

Mr. Finston: The same objection.

The Court: Overruled.

Mr. Schwartz (Reading):

"Q. And what took place?

(Deposition of Robert Kagan.)

"A. After lengthy correspondence with Washington and procuring various documents required by the Immigration Department as to my ability to employ him, and also the approval of the United States Unemployment Division to the fact that violin makers were not available, I finally received a permit for his arrival to the United States.

"Q. When was that?

"A. In 1947, I think in June or July, something like that.

"Q. Following the permit, did Mr. Batelli come here? A. Yes.

"Q. And he arrived here approximately when?

"A. June or July in 1947. [51]

"Q. What did he do?

"A. I have arranged a hotel room for him. I paid for his hotel room not far from our office, so that he should not have to travel and I purchased for him a bench and all the necessary tools and equipment. I bought him some clothes.

"Q. Now, approximately what did you spend for his fare?"

Mr. Finston: Just a moment. Your Honor, that question has nothing to do with any claim for damages, has no bearing upon what damages may have approximately flowed from an alleged breach of this contract, and the question is totally immaterial, irrelevant and incompetent.

The Court: Read the question again.

Mr. Schwartz: "Q. Now, approximately what did you spend for his fare?"

(Deposition of Robert Kagan.)

I think it is illustrative of the entire picture.

The Court: All right. Overruled. I think I allowed the other one, that he employed the attorney and what he paid for fees, to show it was not just an ordinary contract of hire. Overruled.

Mr. Schwartz (Continuing reading):

"A. About $300.00.

"Q. Did you furnish that? A. Yes. [52]

"Q. Approximately what did the other expenses amount to?"

Mr. Finston: The same objection, your Honor, to that one. The same objection, to cover all the grounds I have covered in my previous objections.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. About another $100.00 out of my own pocket and also about $250.00 from Kagan & Gaines for buying the necessary tools and equipment.

"Q. Were you ever reimbursed for this money?"

Mr. Finston: Just a moment. The same objection.

The Court: Overruled.

Mr. Finston: Upon all of the grounds previously stated.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. No, sir.

"Q. So Mr. Batelli began to work for you then at what salary?

"A. I started him at $35.00 for the first week in order to find out his ability.

(Deposition of Robert Kagan.)

"Q. What did you discover?

"A. I discovered that his quality of work did not live up to American standards. However, I saw with some experience he could develop to be a pretty capable [53] repair man.

"Q. So, what if anything did you do?

"A. I have given him about a hundred violin bridges and began to show him how the bridges were to be cut to satisfy quality work demanded by American musicians. I have also given him some of our own inexpensive violins in order to show him the type of work that is required in our shop.

"Q. Did Mr. Batelli continue to work for you then? A. Yes, sir.

"Q. In what capacity?

"A. As a violin repair man.

"Q. How long did he continue to work for you?

"A. He worked for me until some time in 1950.

"Q. What was his salary at that time?

"A. His salary was progressing, it was increasing every few weeks.

"Q. For how long a period did he stay at $35.00 a week? A. About a week or two.

"Q. When what was his salary?

"A. I was increasing it $5.00 every so often.

"Q. Did he have a contract with you at that time? A. No, sir.

"Q. Incidentally, how long did he work under this [54] work permit?

"A. For a year's time.

"Q. What was his salary at the end of the year?

(Deposition of Robert Kagan.)

"A. By that time his salary was about $50.00 or $55.00, I don't remember exactly.

"Q. What took place at the end of the year?

"A. At the end of the year, the Immigration Department wanted to send him back to Italy."

Mr. Finston: Just a moment. I move to strike that out as being the opinion and conclusion of this witness.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"Q. This would have been then in 1948?

"A. Yes.

"Q. What, if anything, took place then?

"A. I went to the Immigration Department myself and after discussing with the Chief Immigration Officer in Chicago and calling and corresponding with the head of the Immigration Department in Washington, I got him an extension for six months.

"Q. That brought it into 1949?

"A. Yes, sir.

"Q. What took place then?

"A. At the end of six months again the Immigration Department wanted to send him back to Italy and again [55] through a lot of efforts I received a permit to extend it another six months and I have engaged then an attorney to see if we can prove to the Immigration Department the importance of having this man remain in this country permanently.

"Q. As a United States citizen?

(Deposition of Robert Kagan.)

"A. As a United States citizen.

"Q. Which attorney did you hire for that?"

Mr. Finston: Just a moment. I object to that as totally immaterial, irrelevant and incompetent.

The Court: Overruled.

Mr. Finston: What is the difference whether he engaged an attorney, or who he engaged?

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. Mr. Joseph Golde.

"Q. Who was he?

"A. He was an attorney practicing in Chicago.

"Q. What arrangements did you make with Mr. Golde?

"A. Mr. Golde told me that it is a very difficult job,"——

Mr. Finston: Your Honor. I object to all of this as inadmissible hearsay. We are not interested in what Mr. Golde told anybody.

The Court: Overruled. [56]

Mr. Schwartz (Continuing reading):

"A. Mr. Golde told me that it is a very difficult job, that he may have to make trips to Washington to prove his case and he expected me to pay him the money he expended. He also told me that he does not guarantee that he will succeed, but he promised to do his very best and his fee and expenses may run as high as $1,500.00.

"Q. Did you enter into a contract with Mr. Golde?"

Mr. Finston: Just a moment. I object to that.

(Deposition of Robert Kagan.)

Of what consequence is it whether this plaintiff entered into a contract with Mr. Golde or not? I object that this question is totally immaterial, irrelevant and incompetent.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. Yes, sir.

"Q. I show you Plaintiff's Exhibit 1 for identification and ask you if this is the contract which you signed with Mr. Golde concerning this?

"A. Yes.

"Q. This provided for payment of $1,200.00?

"A. Yes.

"Q. Did you pay Mr. Golde the $1,200.00?

"A. Yes.

"Q. I show you Plaintiff's Exhibit 2 for identification and Plaintiff's Exhibit 3 for identification and [57] ask you what these purport to be?

"A this is the first $200.00 check I gave him, Mr. Golde.

"Q. That is Plaintiff's Exhibit 2."

Mr. Finston: Just a moment, Mr. Schwartz. I am objecting to all of those questions and answers pertaining to whether or not he paid any money to Mr. Golde for the simple reason that they have no bearing at all upon any of the issues framed in this case. This is not a suit for their recovery.

The Court: Overruled. I have already ruled these bear upon the relationship between the parties, to show how the contract of employment was entered

(Deposition of Robert Kagan.)

into, even though no claim for reimbursement of those damages is asked for these expenditures. Overruled.

Mr. Finston: I will state in that connection that there was nothing in the contract in this suit which has any bearing whatever, directly or indirectly, upon any possible contract that this plaintiff may have entered into with any third parties.

The Court: That is right. Overruled. Also, on the assumption that the defendant has pleaded his counter-claim in good faith, I will allow it in anticipation, to show these relationships as going to prove good faith. These expenditures of money would show why, after all of this difficulty the plaintiff felt so disappointed that he instituted the [58] action. So it bears upon that action also, and while it is anticipatory, no error can be committed. I assume that counsel, having pleaded that in rebuttal, and having asked for a continuance when the case was set on the ground that they had to have a witness present here at the time, and having gotten it, he will attempt to prove their contract. He does not have to, but I have a right to assume that all of his actions, in filing it and asking me to continue the case so that he could prove it were made in good faith, and in anticipation I have allowed these questions to be asked, as going to the good faith of the plaintiff.

Mr. Finston: Then I will answer that, if I may, at this point, your Honor. At the time the counter-claim was filed for malicious prosecution, I had a

(Deposition of Robert Kagan.)

discussion with my client, Mr. Batelli, and he indicated to me that there were many persons in Chicago who also saw Mr. Kagan, the plaintiff, tear up the first contract. On that basis I discussed with the client the question of malicious prosecution on the contract by the plaintiff, which he knew he had deliberately torn up.

I might also say this, that at the time we made an application for a continuance, Mr. Batelli was contemplating bringing in certain witness or witnesses from Chicago. Since then such witnesses have not been brought in because Mr. Batelli earns $65.00 a week. He tried very hard to contact [59] certain witnesses, or attempted to contact certain witnesses, and I don't want to disappoint the court at this point,——

The Court: I am not disappointed.

Mr. Finston: ——but I am simply answering the arguments for the record. There will be no attempted proof of the cross-complaint for failure of evidence, because Mr. Batelli——

The Court: The ruling still stands. If at the time the plaintiff rests, you announce that you are not offering evidence on the cross-complaint, you may renew the motion to strike this testimony from the record.

Mr. Finston: May I make one further observation? At the time the motion was made for the continuance of this action, in order that we may have an opportunity perhaps to bring in an additional witness, at the very same time another

(Deposition of Robert Kagan.)

motion was made to require the plaintiff in this case to have his deposition taken on written interrogatories rather than on oral interrogatories, and an explanation was then made to the court that this plaintiff was a poor working man, earning $60.00 or $65.00 a week, and could not afford any representation in Chicago on a deposition taken on oral interrogatories, and the court denied that motion.

The Court: That is right. I will still allow these questions to be asked, subject to a motion to strike later on if no evidence as to the counter-claim is offered. Go ahead. [60]

Mr. Schwartz: "Q. That is Plaintiff's Exhibit 2."

Mr. Finston: At what page, please? Page 11?

Mr. Schwartz: Page 11.

Mr. Finston: At the middle of the page?

Mr. Schwartz: Yes. (Reading):

"Q. That is Plaintiff's Exhibit 2. And what is Plaintiff's Exhibit 3?

"A. That is a check for $1,000.00 which I gave him.

"Q. Or a total of $1,200.00, which was paid to Mr. Golde? A. Yes.

"Q. According to the contract which you signed with Mr. Golde, what was he to do for this $1,200.00?

"A. As I stated before, he was supposed to perform all the necessary work and he was to procure citizenship for Mr. Batelli and he was also to

(Deposition of Robert Kagan.)

prepare a contract of employment for Mr. Batelli to be employed by Kagan & Gaines, Inc.

"Q. Now, prior to signing this contract, did you have a conversation with Mr. Batelli?

"A. Yes, sir."

Mr. Finston: I object to all conversations had with Mr. Batelli prior to the signing of any contract.

The Court: The objection will be overruled. As the answer to the question shows, these negotiations were all [61] bunched together, and the efforts to secure citizenship were a part of his contract to follow for employment for a period of years, so that they are all interrelated and should not be split up. Go ahead.

Mr. Schwartz: "Yes, sir."

That is, the question was:

"Q. Now, prior to signing this contract, did you have a conversation with Mr. Batelli?

"A. Yes, sir.

"Q. Approximately when did it take place?

"A. The early part of July, 1949.

"Q. Where did it take place?

"A. In my office.

"Q. Who was present at that time?

"A. Mr. Batelli and myself.

"Q. What, if anything, did he say and what did you say?

"A. I told Mr. Batelli that I am spending an awful lot of efforts and money to try to make him an American citizen and I would not want to do all this if he does not intend to stay and I asked

(Deposition of Robert Kagan.)

him whether he is prepared to sign a contract with me for a period of a minimum of five years. On that he answered not only for five years, but he will work for me for the rest of his life because he is so grateful for what I have done for him. [62]

"Q. What steps then did you proceed to take in connection with the citizenship?"

Mr. Finston: I object to all of that as being totally immaterial. irrelevant and incompetent, and not within any of the issues framed by the complaint.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. I turned over all the correspondence with Washington and Unemployment Compensation Bureau to Mr. Golde and Mr. Golde is the one who procured a special Bill before the Congress and he became an American citizen.

"Q. Did you also have to procure certain affidavits from various people?

"A. Yes. At Mr. Golde's request, I had to go to some of our competitors and confirm my statement that violin makers are extremely scarce and badly needed in the United States and Mr. Batelli is worthy to become an American citizen."

Mr. Finston: I move to strike that entire answer as being inadmissible hearsay.

The Court: Read the question again.

Mr. Schwartz (Reading):

(Deposition of Robert Kagan.)

"Q. Did you also have to procure certain affidavits from various people? [63]

"A. Yes. At Mr. Golde's request, I had to go to some of our competitors and confirm my statement that violin makers are extremely scarce and badly needed in the United States and Mr. Batelli is worthy to become an American citizen."

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"Q. As a result of Mr. Golde's efforts, what, if anything, took place?

"A. The Bill was presented before Congress.

"Q. Was it enacted?

"A. It was enacted and signed by the President and he became an American citizen.

"Q. At that time did you prepare a contract with Mr. Batelli?

"A. Mr. Golde prepared a contract as per my agreement with Mr. Batelli. He took this contract home with him to study it, as he expressed himself, and came back the next morning and told me everything is all right and he signed it and gave it to me.

"Q. Now, was this signed in your presence?

"A. Yes, sir.

"Q. And this contract was the same contract that is listed in this cause of action as Exhibit 'A'?

"A. Yes, sir." [64]

For the record, I think it should be shown he was referring to the first contract in this testimony, and not the second.

The Court: All right.

(Deposition of Robert Kagan.)

Mr. Schwartz (Continuing reading):

"Q. And this contract has not been changed in any way? A. No, sir.

"Q. It is in the same condition now as when you signed it? A. Yes, sir.

"Q. Now, what was the salary of Mr. Batelli at that time? A. $75.00 a week.

"Q. Was it signed on the day that it bears, namely, June 1, 1950? A. Yes, sir.

"Q. Now, did Mr. Batelli ever repay you for any of this money that you advanced?

"A. No, sir.

"Q. Did Mr. Batelli work for you the five years as listed in this contract? A. No, sir.

"Q. When did he cease his employment with your Comany?

"A. Approximately in June, 1951. [65]

"Q. Did he give you any notice?

"A. No, sir.

"Q. Will you please tell the court what, if anything, took place at that time?

"A. Mr. Bartelli told me that two weeks vacation is coming to him and he wants to get on his own two weeks without pay and he likes to go to Italy and liquidate his affairs there and bring his family to this country.

"Q. Did he request any vacation?

"A. He said two weeks was due him and he requested the money for those two weeks and he requested permission to stay an extra two weeks.

"Q. What, if anything, did you say?

(Deposition of Robert Kagan.)

"A. I told him it is perfectly all right for him to go and bring his family and I told him that, upon his arrival back, I will be glad to try to procure for him a larger apartment and I will do everything possible to make him and his family comfortable, but I impressed upon him the fact that he should not stay longer than four weeks, because of the accumulation of work which we have on hand and which will accumulate during his absence."

The Court: Mr. Schwartz, the present deposition has already gone into that.

Mr. Schwartz: I agree.

The Court: It seems to me that that portion could very [66] well be omitted, and get down to some of those figures in regard to losses.

Mr. Schwartz: I agree, your Honor.

The Court: The other questions had been gone into in the second deposition, so this is repetitious.

Mr. Schwartz: I agree, sir.

The Court: Because he testified in the deposition in this case that he even gave him a party, and that he thought his family was not here. So there is no use to repeat that. Perhaps if we took a recess—it is after 12:00 o'clock now, and, as you know, I have other duties other than trial work——

Mr. Schwartz: Yes, sir.

The Court: ——you might go over that and eliminate some of the things that are in the deposition you have already read, and just merely read what is left that is not in the other deposition.

(Deposition of Robert Kagan.)

Mr. Schwartz: Very well. I will do that, your Honor.

Mr. Finston: I wonder how we can do that. Mr. Schwartz has ceased talking to me since the conclusion of the last case.

The Court: How is that?

Mr. Finston: I wonder how we can do that. Mr. Schwartz has ceased talking to me since the conclusion of the last case. [67]

The Court: I am not asking him to consult with you. I am merely saying for him to go over the record and see if he can eliminate something, and then if you want it in, you can have it in.

Mr. Finston: Thank you, sir.

The Court: One party has a right to read any portion of a deposition, and if he leaves something out, the other side may read that. I am not suggesting anything else. I realize that in the mood in which you find yourself this morning that any approach by the other side would not be fruitful of results .

Mr. Finston: I am not in that mood at all, sir.

The Court: Just a moment. I am taking you at what you said. I am merely saying that I am not suggesting that you two get together on it. I am merely suggesting that he go over it and eliminate things which, in my opinion, are covered by the other deposition, and to merely confine himself to offering what is not in the other deposition, subject to your right to have it in if you want it, as the rules provide.

(Deposition of Robert Kagan.)

Mr. Finston: Fine.

The Court: All right. 2:00 o'clock. By the way, do you want Mr. Batelli here?

Mr. Schwartz: I think he ought to be here.

The Court: All right. I will order the defendant to produce Mr. Batelli at 2:00 o'clock. [68]

Mr. Finston: May I ask, your Honor, with all due respect, on what authority such an order is made?

I want to ask this question: Am I under obligation to help the opposition prove his case? I am trying to represent my client as well as possible.

The Court: That is right.

Mr. Finston: This is my client.

The Court: If you don't want to——

Mr. Finston: I couldn't understand the basis for the court's order, to have the client brought in. I am going to bring the client in, but I could not understand the basis for the court's order.

The Court: You don't need to understand it. A lawsuit is not a game, and when a man comes into court and asks affirmative relief in a case, and the other side wants to examine him under 43(b), even if they have not issued a subpoena, I have the right to issue a forthwith subpoena, and rather than issue it forthwith and send the marshal out for him, I am giving you an opportunity to produce him. If you don't want to do so——

Mr. Finston: I was going to produce him, but I didn't think it was in the interests of my client

(Deposition of Robert Kagan.)

that I produce him to help the opposition prove its case.

The Court: I am not ordering you to produce him. I am merely saying counsel has requested his presence. I am giving [69] you an opportunity to bring him here. If at 2:00 o'clock he isn't here, I will issue a forthwith subpoena, and send the marshal out to produce him.

Mr. Finston: He will be in, sir.

The Court: All right.

(Whereupon at 12:10 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day). [70]

Wednesday, March 9, 1955, 2:00 P.M.

The Court: Cause on trial.

Mr. Schwartz: Reading from Page 16 of the deposition of Mr. Robert Kagan of February 5, 1954:

"Q. What wages was he receiving at the time that he left you?

"A. $75.00 a week."

Then I am skipping the next two questions and answers, and come to this question:

"Q. During the time that you—immediately preceding the time that Mr. Batelli left, did you engage in any advertising concerning Mr. Batelli's work?"

Mr. Finston: I am going to object to that question on all the grounds heretofore given on similar objections to similar questions.

(Deposition of Robert Kagan.)

The Court: Overruled.

Mr. Schwartz (Reading):

"A. Yes, sir. I spent considerable money advertising in various programs in schools, universities and the Chicago Symphony.

"Q. Approximately how much did you spend in the year preceding his leaving in advertising?"

Mr. Finston: The same objection, your Honor.

The Court: Overruled. [71]

Mr. Schwartz (Reading):

"A. About $300.00

"Q. And the year prior to that?

"A. About $150.00.

"Q. Can you give us the names of some of the publications in which you took ads?

"A. Chicago Symphony Orchestra programs, Catholic Schools program, Chicago Public Schools Programs.

"Q. Now, I show you page 3 of the Sigmund Romberg program on April 29, 1951, and ask you if you placed that ad concerning Mr. Batelli?"

Mr. Finston: Just a moment. I object specifically to this question as it does not even cover the period in suit. The complaint is based upon a contract allegedly entered into in June of 1950, or 1951, your Honor.

Mr. Schwartz: 1950.

The Court: What is the date of the program?

Mr. Schwartz: April 29, 1951. He left in June, 1951.

Mr. Finston: I am sorry, your Honor. I mis-

(Deposition of Robert Kagan.)

stated the condition. I will withdraw that specific objection, sir.

Mr. Schwartz (Continuing reading):

"A. Yes.

"Q. Is that the size of the ad which you normally would take in the various publications?

"A. Yes. [72]

"Q. I show you page 5 of the Arturo Toscanini program of May 17, 1950, and ask you if that is another example of the ad of Kagan & Gaines and Mr. Batelli?"

Mr. Finston: Just a moment. I am going to object to that question as it covers a period of time which antedates the date of the contract in suit.

The Court: Overruled. It tends to show that the advertising campaign was continuous from the time of the original employment. Go ahead.

Mr. Schwartz (Reading):

"A. Yes, sir.

"Q. What other advertising did you arrange for? A. Newspapers.

"Q. What did this advertising consist of?

"A. Articles and photographs placed in all the leading Chicago papers during the month of May, 1950.

"Q. Did this cost you any money?

"A. Approximately $100.00 for entertainment and expenses.

"Q. Was this money reimbursed you by Mr. Batelli? A. No, sir."

Now, skipping to Page 18, this question:

(Deposition of Robert Kagan.)

"Q. Did you keep a record approximately of how many instruments you had in your plant for repair at the time you found out that Mr. Batelli was not returning?" [73]

Mr. Finston: Just a moment, please, Mr. Schwartz. I don't see that question. Is that on Page 18, sir?

Mr. Schwartz: Page 18, the first question after the answer on top. Do you find it?

Mr. Finston: Yes.

Mr. Schwartz (Reading):

"A. Yes.

"Q. How many were there?

"A. There were thirteen violins with various amounts of work to be done and the total amount of the labor on these instruments was $700.00.

There were two violas with major repairs. The total work on these amounted to $200.00.

There were six cellos, the total amount of work on these was $500.00.

There were two basses and the total work on that amounted to $100.00.

"Q. So the gross amount of work was approximately how much? A. $1,500.00.

"Q. Now, approximately what would the profit be on these items?

"A. About from one-third to one-half approximately, between $500.00 and $700.00.

"Q. What did you do with this repair [74] work?

"A. Ninety per cent of this work I had to return

(Deposition of Robert Kagan.)

to the customers because of our inability to repair it and ten per cent of it was sublet to other violin makers in Chicago.

"Q. Could you have sublet the others?

"A. No, sir, they were all extremely busy. They did me a favor and did the inexpensive instruments that people needed very badly as a favor to me and they repaired it at the price we agreed to repair these instruments, so we made no profit at all.

"Q. Did you lose any customers as a result of this? A. Definitely so.

"Q. Do you know approximately who the customers were? A. Yes.

"Q. What customers did you lose?

"A. We lost two violinists, who were very angry and still are for not performing their work and we lost about six schools for the same reason.

"Q. Now, approximately how much gross business did you receive previously from those accounts and do you know the names of the musicians?

"A. Yes.

"Q. What are their names?

"A. One is Wilkomirski and one is Kowalkowski. [75]

"Q. Approximately how much business per year did you usually receive from these accounts?

"A. It is pretty hard to say, but approximately from all of them about $2,000.00 a year.

"Q. According to this contract, who was to receive Mr. Batelli's exclusive services?"

(Deposition of Robert Kagan.)

Mr. Finston: Just a moment. Objection, because the question is directed to a contract not in suit. The question is directed to a previous lawsuit affecting this particular contract, but the previous lawsuit has been completely adjudicated and is a thing of the past. The question is immaterial, irrelevant and incompetent.

Mr. Schwartz: Your Honor, the question does not go to any previous lawsuit. The question goes to the contract.

Mr. Finston: The question goes according to that contract.

Mr. Schwartz: Yes. Now, the contract this is referring to has exactly and identically the same provision as does the one in suit.

Mr. Finston: I am not trying to interpret the contracts. I am merely stating that the question is directed to a contract in connection with a suit which has been previously brought and completely adjudicated.

The Court: Let us not get away from the scope of this inquiry. The fact remains the previous lawsuit was not adjudicated, or it was adjudicated only on a very narrow point, and [76] that is, that the contract sued on had been abandoned. I did not find anything on the issues. In fact, I didn't approve the findings of counsel, nor the counter-findings you had proposed, and I wrote my own findings, and I said specifically that I am making no findings as to damage. In paragraph 12 I say:

"In view of the conclusion reached that the agree-

(Deposition of Robert Kagan.)

ment sued on was abandoned by the parties and was not in force at the time the defendant terminated his employment, without legal cause or excuse, and/or at the time when the action was instituted, the court makes no findings as to any of the other issues raised by the complaint and answer, including, more specifically, the issue of damages claimed by the plaintiff."

So I made no finding as to it, and specifically said so. Therefore, the question of damages as of the time that the new contract was entered into, and at the time he left the employment, is open. To show that specifically, here are the proposed findings by Mr. Schwartz, and he put in a paragraph where he wanted this finding:

"By reason of defendant's failure to notify Plaintiff of Defendant's termination of his employment, Plaintiff was damaged in its business."

I eliminated that, and I said that I am not making any findings as to the damages, so that question is entirely open. [77]

So the other case merely adjudicates that one thing. That is why I say, in retrospect I think I made a mistake. I think I should have allowed the pleadings to be modified as to the new contract, and if you had pleaded then that you were taken by surprise, I should have continued the case, because the new rules say that amendments should be allowed at all times as of course, and we could have continued it, and the case would not have had to be gone over. But I thought because

(Deposition of Robert Kagan.)

of the clear issue upon that one proposition, I should not allow it. But to go back to it, I say that is all I decided. I did not decide they were not damaged. I merely said that I am not making any finding as to damages. So you won the case on merely a technical proposition, that the contract they sued on was terminated.

Now they have brought a new suit on the contract that was substituted, and then all the questions are before me: Where this new contract was broken, whether it was in existence at the time of the termination agreement, and whether there was damage. And that evidence was given. It matters not whether it relates to one contract or the other. We are concerned with what damage they suffered at the time the man left the employ. He admitted he left the employ. I don't think it is denied in the pleadings here that he left the employ. So the question of damages from the time of the severance, we will put it that way, from the time of the [78] separation, so as not to say that he left because of or implying any fault on the part of anybody, is in issue.

The objection is overruled. Go ahead.

Mr. Schwartz (Reading):

"Q. According to this contract, who was to receive Mr. Batelli's exclusive service?

"A. Kagan & Gaines, Inc.

"Q. Do you know of your own knowledge whether Mr. Batelli complied with this provision of the contract? A. I do know.

"Q. Did he? A. He did not comply.

(Deposition of Robert Kagan.)

"Q. In what way? In what way did he breach this contract?

"A. I found out that he had used our materials,"——

Mr. Finston: Just a moment. I am going to object to that whole answer as apparently not even being testified to from personal knowledge. It sounds like a hearsay answer, "I found out that he had used our materials," et cetera, et cetera. There isn't the slightest indication that there is any testimony in here from the witness' personal knowledge or personal observation.

Mr. Schwartz: It is a matter of cross-examination, I submit.

Mr. Finston: That would be very fine if we had an [79] opportunity to cross-examine the witness.

Mr. Schwartz: You had an opportunity. You did not avail yourself of it.

The Court: Just a minute. Just a minute.

Mr. Finston: We didn't think we needed to.

The Court: The objection is overruled.

Mr. Schwartz (Continuing reading):

"A. I found out that he had used our materials, such as violin tops, backs, ribs and necks and on our time, while he was getting paid for his services, on the sly he was making some violins.

"Q. Do you know how many he made?

"A. To my definite knowledge he made five violins."

Going now to the next page:

"Q. Do you know some of the people who he

(Deposition of Robert Kagan.)

sold these violins to? A. Yes.

"Q. What are their names?

"A. One is Mort Schaffner."

Then the next question:

"Q. Who else?

"A. Through Mr. Schaffner another violin was sold to Mr. Schaffner's friend. I do not remember his name. He is a cripple, a former musician."

Then skipping the next question: [80]

"Q. Were there any other people that you know of?

"A. He sold some violins to his Italian friends, whose names I do not know.

"Q. But in all there were five violins?

"A. Yes.

"Q. Or a total sales price of approximately $1,500.00?"

Mr. Finston: Just a moment. I am going to object to that question. I want to show your Honor what questions were omitted before counsel reached this last question.

The Court: He omitted them at my suggestion. If you want them in, we will put them in.

Mr. Finston: No. May I indicate why I am going to object to this question? These were the questions that were omitted, and properly omitted, and I am reading from Page 20, the last question, which reads as follows:

"Q. Do you know what the price of these violins was?"

And the answer is: "From what I gather from

(Deposition of Robert Kagan.)

people who bought these violins from him, he sold them for $300.00 each," which is an obvious heresay statement.

The Court: No, the hearsay rule does not apply to prices paid, and especially the price of personal property, and almost anything. Price may be proved by knowledge of the person, by what somebody else told him as to the price actually paid, and the Circuit Court of Appeals has so held [81] repeatedly in this circuit.

The easiest thing to prove is price. As a matter of fact, I wrote an opinion, and I can't now think of the case in which I wrote it, for the Court of Appeals, in which I gathered all the cases and showed that the greatest liberality obtains in such proof. No, I think Judge Healy wrote it, because it was a per curiam opinion, in which I participated. I will have it before the day is over, and I will give you the case. It was a bankruptcy case which arose from Arizona. And you can even prove it by book value, the way it was entered on the books. Go ahead.

Mr. Schwartz (Continuing reading):

"Q. Did Mr. Batelli ever reimburse you for either the time or materials of yours that were used by him? A. No.

"Q. Did he ever tell you he was taking this merchandise from you? A. No, sir."

Now, I am going to skip to this question, which is on Page 23:

"Q. Now, actually as far as your damages, Mr.

(Deposition of Robert Kagan.)

Kagan, you paid Mr. Batelli two weeks' salary before he left? A. Yes, sir.

"Q. He never returned and never worked those two weeks, is that correct? [82] A. Yes.

"Q. How much was that salary?

"A. $150.00.

"Q. About how much repairs did you lose during the period he was gone?

"A. About $750.00.

"Q. That would be net profit? A. Yes.

"Q. At the time Mr. Batelli left how much money did he owe you in addition to the two weeks' salary?

"A. He owed me $185.00 on account of a $200.00 loan I gave him."

Mr. Finston: I object to that.

The Court: You are not seeking to recover that?

Mr. Schwartz: No.

The Court: That may be stricken.

Mr. Schwartz: All right.

The Court: You are seeking to recover merely general damages that have been lost in the second cause of action, and then the third cause of action is for materials?

Mr. Schwartz: That is right.

The Court: And the fourth cause of action is a general one, that he sold violins and failed to account.

However, when it comes to the damages, you have bunched together all the causes of action,

(Deposition of Robert Kagan.)

except the first one, into [83] that $1,500.00, under the different theories.

Mr. Schwartz: Yes, sir.

The Court: And your first count on general damages is contained only in Count I.

Mr. Schwartz (Reading):

"Q. Now, approximately what expenses incurred for Mr. Batelli have you not been reimbursed for?"

Mr. Finston: I object to that on all of the grounds previously stated.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. $1,200.00 advanced as attorney's fees;"—and that may go out, as far as I am concerned.

The Court: All right.

Mr. Schwartz (Continuing reading):

"——$200.00 in materials which he used to make violins for other people; $750.00, approximate profit for the work that we contracted for and which we had to return, and also we refunded the money as a deposit on five violins. There were five violins to be made by Batelli for five customers and on which we had received deposits and which we had to return on which we would have made approximately $700.00.

"Q. Do you have the names of the customers?

"A. Yes. [84]

"Q. What were their names?

"A. Mike Wilkomirsky, Joseph Chapek, R. Goldberg, Milton Predes and Franz Polosny.

(Deposition of Robert Kagan.)

"Q. What was the approximate sales price for these violins? A. $300.00 each.

"Q. How many violins were there?

"A. Five.

"Q. Did the volume of repairs that Kagan & Gaines made on stringed instruments continue to be the same following Mr. Batelli's departure?"

Mr. Finston: Just a moment. I object to that question as calling for the witness' conclusion. The volume may have been affected by a thousand different causes other than Mr. Batelli's departure.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. No, sir. It dropped to about half.

"Q. So there was a loss of how much volume in business? A. About $10,000.00.

"Q. And about how much of that was net profit? A. About $3,000.00.

"Q. How long did the volume continue to be dropped?

"A. For about a year and a half to two [85] years."

Now, skipping over to Page 26:

"Q. Did Mr. Batelli ever sell new violins to other people on his own while in your employ?

"A. Yes, he approached customers of mine while they were in the Kagan & Gaines premises on routine business and in a sly way sold five violins at $300.00 each.

"He used my parts and the time for which I paid him and never paid me for anything.

(Deposition of Robert Kagan.)

"The people's names are Mort Schaffner, Philip Sharf and Ted Flowers and two other people whose names I don't remember at this time."

The Court: What was the total of those?

Mr. Schwartz: I beg your pardon?

The Court: What was the total of those items, or are those the same that are included in the prior figure?

Mr. Schwartz: No, these are five other violins at $300.00 each.

The Court: You mean he sold violins at that price?

Mr. Schwartz: Mr. Batelli did, yes, sir.

The Court: Of course, that does not show that it was all profit.

Mr. Schwartz: No, the profit factor he estimated to be one-third to one-half.

Mr. Finston: That is not so, your Honor. That profit [86] factor was based on, I think, not sales, but just on repair of instruments. You are talking now about sales of instruments.

The Court: These are over and above the sums which you gave me before, running to about $2,100.00 of losses on repair jobs. These are new ones. This is a claim of sale, and, of course, the sale price represents material, and assuming that the labor could not be charged for, he would still be entitled to reimbursement for the violins on which he worked.

Go ahead. I am just trying to see what actual proof of damage is going into the record, that is all. Does that end it?

Mr. Schwartz: That ends the deposition of Mr. Kagan. I want to introduce in evidence the program showing the kind of advertising that the witness referred to.

The Court: All right.

Mr. Finston: Of course, I object to that. At the most, it is immaterial.

The Court: Overruled.

Mr. Schwartz: Do you want to see it?

Mr. Finston: No.

The Court: Overruled.

The Clerk: That will be Plaintiff's Exhibit No. 4. Received in evidence, your Honor?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 4, and was received in evidence.) [87]

Mr. Schwartz: Then at this time I want to introduce from the files of Case No. 14787-T, which has heretofore been offered in evidence, the depositions on file therein of Philip Scharf and Anthony Kovalkowski.

Mr. Finston: And, your Honor, of course I object to them as being inadmissible hearsay. They are not depositions herein.

The Court: What is that?

Mr. Schwartz: These are depositions which are in the file which is in evidence, and these depositions were filed.

Mr. Finston: We never had the opportunity to cross-examine.

Mr. Schwartz: These were taken on notice.

The Court: Just a moment. Let's have one at a time, gentlemen. I am going to rule that all the depositions in the other case are admissible, because the other case was not decided on the merits, but was really a dismissal of the action on the ground that the evidence showed the contract had been abandoned, and for the other reasons I have already indicated I am going to allow all the depositions in the other case to be used in this case.

The Clerk: Should I mark them as an exhibit, your Honor?

The Court: No. I am merely ruling that they are admissible, but you will have to read the questions. You can give them a number for identification, and you will have to [88] read the questions, so that counsel can object to the individual questions as you read them.

The Clerk: That will be Exhibit No. 5, for identification?

The Court: I beg pardon?

The Clerk: That will be Exhibit No. 5, for identification?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 5, for identification.)

Mr. Schwartz (Reading):

"The depositions of Philip Scharf and Anthony Kovalkowski, witnesses, taken on behalf of the plaintiff in the above-entitled cause on the 25th day of March, A.D. 1954, at the hour of ten o'clock

a.m. at the office of Manuel J. Robbins, 39 South LaSalle Street, Chicago, Illinois, before Rose Finsky, a Notary Public in and for the County of Cook and State of Illinois, pursuant to notice.

"Present: Manuel J. Robbins, Esq.
"Appearing for Plaintiff

"PHILIP SCHARF

"a witness, called in behalf of plaintiff, being first [89] duly sworn, was examined and testified as follows:"——

Mr. Finston: Now, just a moment. May I interrupt? If they have been admitted in evidence, your Honor, I think we would save everybody's time if they are not read, because I objected to their admission in evidence——

The Court: I insist they be read, because I am not going to use my eyes and read them off the record.

Mr. Finston: All right. I am sorry. But my objection is clear, that I have objected to the introduction of these documents.

The Court: Then if you do not want to object to individual questions, it is up to you. But you started being technical, and I am being technical, too.

Mr. Finston: Then I would like to say this, that I have objection to every question on the ground that it is incompetent and immaterial and irrelevant.

The Court: All right. Then object at the

(Testimony of Philip Scharf.)

proper time. I am not going to accept a general omnibus objection. I will not buy a pig in a poke, if you know that expression, if you have lived on a farm.

Let's read it all individually, and you object to each question.

Mr. Schwartz (Reading):

"Direct Examination

"By Mr. Robbins: [90]

"Q. Will you state your name, please?

"A. Philip Scharf.

"Q. Your address?

"A. 6629 North Glenwood Avenue.

"Q. Is that in Chicago, Illinois? A. Yes.

"Q. What is your business or occupation?

"A. I am a musician with the Chicago Symphony Orchestra.

"Q. How long have you been so engaged?

"A. Ten years.

"Q. Are you acquainted with the firm of Kagan & Gaines? A. Yes.

"Q. In what capacity have you been acquainted with them?

"A. I bought strings there and they do repair work—have had repair work done for my violin.

"Q. How long have you known them?

"A. Eight years.

"Q. During these eight years have you purchased strings and had your repairs done at this Company? A. Yes.

(Testimony of Philip Scharf.)

"Q. Is this the Company you deal with?

"A. Yes. [91]

"Q. Are you acquainted with one Alfio Batelli?

"A. Yes.

"Q. Where did you meet him?

"A. At Kagan & Gaines.

"Q. When did you meet him?

"A. About February, 1950.

"Q. How did you meet him?

"A. I came to Kagan & Gaines and I saw him working at one of the benches. Most of the musicians seemed to know him. He was working there. He came over from Italy. Mr. Kagan brought him over. He told me he was trying to get his family here. He also told me he would like to talk to me about a violin and he told me that he would like to have me visit him at his home.

"Q. Were you introduced to him?

"A. Mr. Kagan introduced me.

"Q. What was he doing?

"A. This was his violin repairman.

"Q. Did he tell you where he lived?

"A. That is what I can't remember, but I think it was around Western and Madison, a room on the third floor. He was living with some people.

"Q. Did you go to his house? A. Yes.

"Q. When was that? [92]

"A. That was about six days after my conversation with him.

"Q. Did you see Mr. Batelli at his home?

"A. Yes, I did.

(Testimony of Philip Scharf.)

"Q. Did you have a conversation with him there? A. Yes.

"Q. Who was present?

"A. Just Mr. Batelli and myself. He told me that he would like to make a violin for me. He had two or three violins hanging there that he had made. He said, 'Why should I buy a violin at Kagans when I could get them cheaper if he would sell them to me right there at his home.' He told me he would gladly make a violin for me. Of course, this would have to be without Mr. Kagan's knowledge because he is giving it cheaper. He made me promise, of course, not to tell Mr. Kagan about this offer.

"Q. Did you give him an order to make a violin for you? A. No, I did not.

"Q. What, if anything, did you tell him at that time?

"A. I told him that I had done business with Kagan & Gaines for many years and that I could not do anything behind his back.

"Q. What did he say, if anything? [93]

"A. He didn't say anything after that. He made me promise that I would not tell Mr. Kagan about this whole conversation.

"Q. Did you know of any other musicians that Mr. Batelli approached on the same proposition?

"A. I had two or three come to me, but I can't remember who they were. Two or three other musicians came to me and told me that Mr. Batelli had made them the same offer.

(Testimony of Philip Scharf.)

"Q. You have no interest in the Kagan & Gaines Company? A. No.

"Q. You are testifying voluntarily and of your own free will? A. Yes."

And that was signed, "Philip Scharf, Witness."

"Anthony Kovalkowski,"——

Mr. Finston: Just a moment. Now, I am making my general objection to the whole deposition and every question contained therein on the ground that the deposition, or the alleged deposition is inadmissible hearsay, that it is incompetent, irrelevant and immaterial, and has no bearing upon any of the issues raised by the pleadings in this case. The objection applies to every one of the questions, as well as to the entire deposition. [94]

The Court: The obection is overruled.

Mr. Schwartz (Reading):

"ANTHONY KOVALKOWSKI

"a witness, called in plaintiff's behalf, being first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Robbins:

"Q. What is your name?

"A. Anthony Kovalkowski, also known as Tony Kovalkowski.

"Q. What is your address?

"A. 5347 West Leland Avenue.

"Q. Is that in Chicago?

(Deposition of Anthony Kovalkowski.)

"A. Yes, Chicago, 30, Illinois.

"Q. What is your business or occupation?

"A. I am a musician.

"Q. With whom are you associated?

"A. I am self-employed.

"Q. Do you have your own orchestra?

"A. Yes.

"Q. Do you know the firm of Kagan & Gaines?

"A. Yes.

"Q. How long have you been acquainted with them? A. At least ten years.

"Q. In what way have you been associated with Kagan [95] & Gaines?

"A. Well, in the purchase and repair of my violins for string. I bought a bow there.

"Q. Have you ever met Alfio Batelli?

"A. Yes, I did.

"Q. When and where did you meet him?

"A. At the firm of Kagan & Gaines late in 1949.

"Q. How did you meet him?

"A. I was introduced to him by Mr. Kagan.

"Q. Where was this?

"A. In the back of the shop.

"Q. Did Mr. Kagan tell you who he was or what he was?

"A. He was brought over by Mr. Kagan as his repairman here in Chicago.

"Q. Did you ever have any conversation with Mr. Batelli? A. Oh, yes.

"Q. Did you have occasion to talk to Mr. Batelli in about February, 1950? A. Yes.

(Deposition of Anthony Kovalkowski.)

"Q. Will you tell us when and where that conversation took place?

"A. That took place in the repair room in the Kagan & Gaines shop. He offered to make a copy of my violin. [96] I have a very fine violin and he offered to make me a copy of it.

"Q. Was this offer made on behalf of Kagan & Gaines? A. No.

"Q. What, if anything, did he say and what did you say?

"A. He said that by making it privately he could save me some money if I would not tell Mr. Kagan.

"Q. Was anyone else present at this conversation? A. No, just he and I.

"Q. What did you say, if anything?

"A. I didn't take to the idea at all.

"Q. What did you answer?

"A. Well, I told him that I had been dealing with the firm of Kagan & Gaines and that if I ever had that done I would work through them.

"Q. What did he say, if anything?

"A. He didn't say anything, but he asked me not to mention this conversation to Mr. Kagan.

"Q. Did you tell Mr. Kagan about this proposition?

"A. No, I didn't. I didn't want to aggravate him.

"Q. Did you order a copy of the violin from Mr. Kagan? A. Yes, eventually I did.

"Q. Do you know about when? [97]

(Deposition of Anthony Kovalkowski.)

"A. I guess it was about 1950 or so.

"Q. About how long after this conversation?

"A. About a month.

"Q. Do you know of your own knowledge who made this violin for you?

"A. Yes, this Alfio Batelli.

"Q. Was there any promise as to how long after the order this violin was to be ready?

"A. Yes, about two and a half months.

"Q. Was it ready in two and a half months?

"A. No. I remember I waited a very long while for it. I don't know how long. I know I got it the day before he sailed for Europe.

"Q. You waited almost a year, did you?

"A. I waited almost a year.

"Q. Did you pay Kagan & Gaines for this violin? A. Yes, I did.

"Q. How much did you pay them?

"A. $400.00.

"Q. Did you inspect the violin after you received it? A. Yes, I did.

"Q. Was it satisfactory? A. Not at all.

"Q. Would you tell us what, if anything, was wrong [98] with the violin?

"A. I inspected it. He made a copy of my Camilli, and his violin was not the same measurements at all. It was the most important thing to me to have an exact copy and another thing was that it was an inferior violin. The varnish was very bad, crudely made and it did not have good

(Deposition of Anthony Kovalkowski.)

sound. The tone was not good, but the workmanship was the worst of it.

"Q. What, if anything, did you do about that?

"A. I demanded my money back from Kagan & Gaines.

"Q. About how long after you received it?

"A. About a week later I saw Mr. Kagan and showed him the violin.

"Q. Did you tell Mr. Kagan at that time about your previous conversation with Mr. Batelli?

"A. When I complained, I also told Mr. Kagan about the previous proposition and I asked him to refund the money.

"Q. Was your money refunded by Mr. Kagan of Kagan & Gaines? A. Yes.

"Q. And you received your $400.00 back?

"A. Yes.

"Q. Are you aware of any other propositions made to any other musicians by Mr. Batelli? [99]

"A. Yes. I heard that he made propositions to several other musicians about working on the side.

"Q. Do you have any interest in Kagan & Gaines? A. No.

"Q. In other words, is your sole connection with them solely as a musician?

"A. That is right.

"Q. Are you appearing here voluntarily and of your own free will? A. Yes."

Signed, "Anton Kawalkowski, Witness."

The Court: All right, Mr. Schwartz.

Mr. Schwartz: Mr. Finston, will you stipulate that Mr. Batelli left the employ of Kagan & Gaines without notice?

Mr. Finston: Yes, I will.

Mr. Schwartz: Will you stipulate that he made five violins and sold them for $300.00 each on his own, without the knowledge of Kagan & Gaines? You can refer——

Mr. Finston: Would you mind repeating that question, please?

Mr. Schwartz: You can refer to Page 38 of his deposition, wherein he said he sold five instruments.

Mr. Finston: He may answer that. I will have Mr. Batelli on the stand in just a few moments. I don't remember exactly whether I can stipulate to that, but I will have Mr. Batelli on the stand with reference to that. [100]

Mr. Schwartz: Mr. Batelli.

The Clerk: Under 43(b)?

Mr. Schwartz: Under 43(b).

The Court: All right.

ALFIO BATELLI

the defendant herein, called as a witness under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, testified as follows:

Direct Examination

By Mr. Schwartz:

Q. You are Alfio Batelli, the defendant in this case? A. Yes.

Q. You were employed by Kagan & Gaines?

(Testimony of Alfio Batelli.)

A. Yes.

Q. While you were employed by Kagan & Gaines, you sold five violins without the knowledge of Mr. Kagan; is that correct? A. Yes.

Q. And the price you received for them was $300.00 a piece? A. Yes.

Q. It is a fact that you told Mr. Kagan that you were going to Europe to get your family over here?

Mr. Finston: We will stipulate as to that. [101]

Mr. Schwartz: Very well. It is stipulated that the defendant advised the plaintiff, through Mr. Robert Kagan, that he was going to Europe for the purpose of bringing his family over here, and that he was to return to work upon his return to this country. So stipulated?

Mr. Finston: I didn't get that last. That he would return——

Mr. Schwartz: That he would return to their employment.

Mr. Finston: I will stipulate to that.

The Court: How is that?

Mr. Finston: Yes, sir; so stipulated.

Mr. Schwartz: It is further stipulated, is it, that Mr. Batelli, at the time he so advised Mr. Kagan, had no intention of going to Europe?

Mr. Finston: I am sorry, Mr. Schwartz, but you had better ask that question.

The Court: I think you had better bring it out.

Q. (By Mr. Schwartz): At the time you told Mr. Kagan that you were going to Europe to bring

(Testimony of Alfio Batelli.)

your family over here, it is a fact, is it not, that you at that time had no intention of going to Europe? Is that correct?

A. In the time I told Mr. Kagan was many months before I left Kagan, I had the intention to go to Europe.

Q. At the time that you left, you did leave the firm and said goodbye to Mr. Kagan, did [102] you not?

A. In this time we had not any discussion.

Q. You told him that you were coming back?

A. We didn't have any discussion.

Q. Did you tell him how long you would be gone at the time you said goodbye?

A. Kagan knew it from, like I told that time, know it from four or five months before I left. He knew I want to go in Europa and that I can't remain over there one year, two year. I didn't say I will be back.

The Court: At the time you left, you didn't intend to go to Europe?

The Witness: No.

The Court: And at the time you left, your family was already in the United States?

The Witness: Yes; yes.

The Court: All right.

Q. (By Mr. Schwartz): And at the time you left, you knew that Mr. Kagan was under the impression that you were going to Europe to get your family; is that correct?

A. This I don't know, which impression he had.

Mr. Schwartz: I beg your pardon?

(Testimony of Alfio Batelli.)

Mr. Finston: He said he didn't know.

The Witness: I don't know.

The Court: I don't think it is material.

Mr. Schwartz: Very well. [103]

The Court: I think if he left, and without notice, it does not make any difference what excuse he gave. The fact that he may have said that he intended to go to Europe might indicate that he led them to believe that he might return. The fact remains that he left and did not return, and that is the point.

Q. (By Mr. Schwartz): Mr. Batelli, I show you what has been marked in evidence here as Plaintiff's Exhibit 3, and ask you whether that is your signature?

Mr. Finston: Pardon me. Is that the one that contains the 365-day notice, Mr. Schwartz?

Mr. Schwartz: Yes.

The Witness: Is this 365 days?

Mr. Schwartz: Yes.

The Witness: Excuse me?

Q. (By Mr. Schwartz): Is that your signature?

A. Yes.

Q. Is that Mr. Kagan's signature?

A. That is, I think.

The Court: It is admitted.

Mr. Finston: We are not questioning the genuineness of the signatures. I just want to know——

Mr. Schwartz: Very well. That is all I want to know.

Mr. Finston: If I may just look at the docu-

(Testimony of Alfio Batelli.)

ment to see that we are all talking about the same document. [104]

Mr. Schwartz: This is the same document that you produced at the first trial.

Mr. Finston: Is this the one—where is that 365-day notice?

Mr. Schwartz: Where is it?

Mr. Finston: Yes.

(Thereupon counsel indicated.)

Mr. Finston: Oh, yes, it is.

Mr. Schwartz: I have no further questions.

Mr. Finston: I have just one or two questions.

The Court: All right.

Cross-Examination

By Mr. Finston:

Q. Those five violins, Mr. Batelli, that you just recently testified you sold at $300.00 per violin, whose violins were they, yours or Mr. Kagan's?

A. It is mine.

Q. You had made those violins outside of Mr. Kagan's establishment?

Mr. Schwartz: I object to that as leading, if the court please.

The Court: He is still your witness. Because they cross-examined him, you cannot cross-examine him. You can examine him now, or examine him later, but you cannot cross-examine [105] him, because he is still your witness.

Mr. Finston: As a matter of fact, your Honor, I am only examining him now with reference to the same matters.

(Testimony of Alfio Batelli.)

The Court: That is true, but that is not cross-examination.

Mr. Finston: All right. Then I will wait.

The Court: You are not allowed to cross-examine. That is the rule, not only under 43(b), but that is also the rule under 2055 of the Code of Civil Procedure, which has been in effect for many, many years. I worked under it from 1927 to 1933 in the Superior Court. You can't cross-examine. You can examine him as to these matters, if you want to, but he is sill your client and your witness.

Mr. Finston: Yes.

The Court: They can cross-examine, but you cannot.

Mr. Finston: All right.

Q. Where did you make those five violins, Mr. Batelli? A. In my home.

Q. During what hours did you make those violins?

A. Sundays, in the evening, after I left the Kagan's.

Q. Where did you get the materials to make them?

A. I bought from Lewis & Son, Chicago.

Q. Who paid for the materials?

A. Myself.

Q. Whose money was it? [106]

A. Was my money.

Mr. Finston: That is all.

Mr. Schwartz: I have no further questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Schwartz: The plaintiff rests, your Honor.

The Court: All right.

Mr. Finston: On behalf of the defendant Batelli, your Honor, I would like to move the court at this point for the purpose of dismissing the cross-complaint.

The Court: All right. The cross-complaint will be dismissed.

Mr. Finston: I would like to make another motion at this point, your Honor, and ask the court's indulgence. I don't know if this is the exact and appropriate time to make the motion. I will ask this court to be good enough to make an order requiring the plaintiff, Kagan & Gaines Co., Inc., a non-resident, to file a cost bond pursuant to the appropriate section of the Civil Code.

The Court: The provisions of the Civil Code do not apply in Federal courts, and the Court of Appeals has so held even in cases relating to libel. I think Mr. Stacey can tell you that, because his judge made the ruling. They held that even in actions for libel, where summons cannot be issued unless you put up a bond for $500.00, it does not bind us, because [107] that is not carried over into our procedure.

Mr. Finston: Then I might be incorrect on this, but then may I renew the motion under Federal Civil Procedure, not being familiar with whether it is so provided or not.

The Court: Before you accept any more Federal cases, you had better familiarize yourself with the

procedure. There is no such provision. Furthermore, this is not the time to make that. When you are brought into court, you may have that right, but not after you have joined issue and gone to trial. The motion will be denied.

Mr. Finston: Mr. Batelli.

ALFIO BATELLI,

the defendant herein, called as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Finston:

Q. During the entire period that you were employed by the plaintiff, Kagan & Gaines Co., Inc., Mr. Batelli, were you employed by or did you work for any other person or company?

A. No, sir.

Q. Did you ever sell any string instruments, or any [108] other instruments at all, that belonged to Mr. Kagan without accounting for them?

A. No, sir.

Q. Did you ever take any of Mr. Kagan's materials in order to use them for the purpose of making violins, as you said you made at your own home? A. No.

Mr. Finston: I have no further questions.

Mr. Schwartz: No questions.

The Court: Just a minute. Any questions?

Mr. Schwartz: No, your Honor.

The Court: All right. Step down.

(Witness excused.)

Mr. Finston: The defendant rests, your Honor.

The Court: All right.

Mr. Schwartz: We move for a judgment, if the court please.

The Court: Let's have a short recess, and then I will hear any comments you want to make on the case.

(A short recess.)

The Court: All right, gentlemen, I will hear any argument you desire to present.

Mr. Schwartz: Your Honor, in support of my motion for judgment for the plaintiff here, I would like to simply observe that the case has devolved itself into a very simple situation, [109] where we have a claim that the contract has been breached by virtue of the failure of the defendant to give notice, as required. This has been admitted, and the only issue, it seems to me, that we have on hand is the question of damages.

I have itemized the various items of damage, as testified to by the plaintiff, and they are as follows, and I am itemizing them according to the testimony of the witness.

For advertising, as appears on Pages 16 and 17, the amount of $550.00.

The Court: I must have gotten the wrong figure. I had it $450.00. We will check them.

Mr. Schwartz: There are three items that make up to $550.00, your Honor.

The Court: All right.

Mr. Schwartz: For work on hand, the loss of

profit was between $500.00 and $700.00, and that appears on Pages 18 and 19.

For loss of customers, as referred to by the witness, a total gross business of $2,000.00, on which the profit would be between one-third and one-half, and, therefore, between $666.00 and $1,000.00.

On Page 24 he testified to a loss of profit of $700.00 on five violins.

The Court: What did you put that at?

Mr. Schwartz: Five violins. [110]

The Court: And what did you put that loss at?

Mr. Schwartz: $700.00. Two weeks' salary in the amount of $150.00.

The Court: Where does that come in?

Mr. Schwartz: I beg your pardon?

The Court: Where does that two weeks' salary come in? Oh, where he took a month instead of two weeks; is that it? Where does that two weeks' salary come in?

Mr. Schwartz: He was paid two weeks' salary on this so-called trip to Europe.

The Court: Oh, I see. That is it. All right.

Mr. Schwartz: Repair work loss, on Page 23, $750.00 profit.

Materials used, Page 24, $200.00.

Loss of business profit, $3,000.00.

And the five violins that were sold.

The Court: You are taking a double loss there. You are taking specific losses and then general losses.

Mr. Schwartz: This would come under the category of general damages.

The Court: Well, general damages must be proved as actual losses.

Mr. Schwartz: He testified, your Honor, that the volume of business dropped in this particular department of $10,000.00, on which there would have been, he estimated, a $3,000.00 [111] profit. That is a specific item of damage. These other items are pinpointed.

And, finally, these five violins that Mr. Batelli made and sold on his own account. On Page 24 the witness testified that there were five violins to be made by Batelli for five customers, and on which we had received deposits, and which we had to return, on which we would have made approximately $700.00.

Now, those are not the same five violins that Mr. Batelli made and sold on his own account. Therefore, the loss of profit—you can't charge him with the whole $1,500.00 which he got, but you can charge him for the profits which the firm would have made had these violins been sold in accordance with the contract by the firm, instead of by this man on his own account.

On that computation, your Honor, the total damages are between $7,217.00 and $7,750.00, the difference being on those two items, where he testified the profits would be between $500.00 and $700.00, and the profits on the other would have been between $666.00 and $1,000.00.

The Court: All right. Anything further?

Mr. Schwartz: No, your Honor.

The Court: All right. I will hear from you.

Mr. Finston: I have nothing further to say, your Honor.

The Court: This is a strange kind of a lawsuit, gentlemen. [112] It illustrates that at times when the court feels that a lawsuit which should be decided upon a narrow ground, with the possibility that if the rights of the parties are fixed, the parties themselves would be satisfied, it does not work out to prevent further litigation.

When I tried the case before, I specifically tried to avoid findings that would determine the merits of the action. I did make a finding that the defendant did not have any legal excuse for leaving the employment. However, I declined to make any findings as to damages. I did make a finding, which I felt was due the plaintiff in that case, negativing the charge that he had been induced by them to make fraudulent representations, or that he quit because he declined to encourage fraudulent representations. Let me find the exact finding.

Yes, I did make a finding that the plaintiff did not instruct defendant to create and insert false, fraudulent and/or misleading labels, or that the plaintiff did not instruct defendant to falsely appraise any musical instrument, and in amplification of findings 9 and 10 I found that "any statements which the plaintiff requested the defendant to make concerning violins which were imported in an unfinished state and then finished by the plaintiff did not exceed what is considered legitimate 'puffing' of one's merchandise. The defendant at no time informed the plaintiff that he would [113] termi-

nate the contract of employment if compelled to make such 'puffing' statements in the future. On the contrary, he continued in the plaintiff's employ after the first such alleged requests were made for over a period of three years, thereby waiving any right he may have had to terminate the employment because of such requests. The court further finds that the requests were not of a character that would degrade the plaintiff, and were not a legal ground for the termination by the plaintiff of his employment without notice."

I felt that in view of the charges made, which were repeated from the stand by the defendant in that case, that that finding should be made.

However, notwithstanding that, I did find that the agreement sued on was abandoned, and declined to make any findings on the issue of damages, and on any of the other issues, so that I found that the plaintiff was not entitled to recover in that case.

I may say for the record that in that particular case, when the attention of counsel was called to the fact that the evidence showed that the particular contract had been substituted for, and that there was in the record evidence from the plaintiff's file to that effect, counsel requested leave to amend, and I felt that I should not grant it at that stage. In view of what has happened since, I think probably that was a tactical mistake on my part. Technically, I was correct because pleadings [114] should not be amended except in extreme cases at the time of trial.

However, in that particular case I think it would have been justified and saved expense all around to everybody, and the time of the court, if leave to amend had been granted, even if it had required continuing the matter on the ground of surprise, assuming that counsel for the defendant had made such motion.

At any rate, the judgment of the court was entered on November 22, 1954.

Now, was this complaint filed before the other case was decided?

Mr. Schwartz: No, sir, afterwards. It was filed on——

The Court: Oh, it is May. I am sorry. I was looking at the wrong document. It was filed on the 5th of May, 1954.

Counsel immediately instituted this action, to which an answer was filed, and in the answer counsel in many respects repeated the charges made on the prior complaint as to fraudulent representation, and they appeared in the answer as to all counts, first, as to the first cause of action, and then carried over into the others, and then a cross-complaint was filed on the same date as the answer, which has since been dismissed.

The case presented by the plaintiff stands without contradiction. Evidently counsel is relying upon his objections to [115] practically the entire evidence, so far as it relates to the damages. The termination of the contract without the year's notice is admitted.

So the plaintiff is entitled to recover upon the

state of the record under any theory, because even if the court should find that no special damages have been proved, the court could award general damages, such as a jury might have awarded in a manner relating to any breach of a contract.

Of course, if the point made by the defendant is correct, and the evidence as to the special losses is true, then the damages would have to be limited to general damages under the first cause of action.

In dealing with a contract of employment, of course, the court must have some basis for making a general award, and it works both ways. The plaintiff, except in case the employee was discharged wrongly, cannot recover losses unless it is shown that they flowed from the discharge, and one of the ways of reducing the claimed damages is to show employment, and, ordinarily, the salaries paid and the profits that might have been made are the basis of damages.

I am satisfied with the rulings that I have made in regard to admitting these prior depositions, and I am going to find for the plaintiff, that the defendant terminated his employment without cause and without giving notice, and that the plaintiff has suffered a loss in profits which the court computes [116] as the sum of $3,000.00 in loss of general damage to the business or the profits they might have made, in addition to which the court finds that the plaintiff has also suffered special damages, such as loss of the expenditure for advertising, the customers' loss, and loss on the profits on violins in the sum of $2,750.00. So I am award-

ing $2,750.00 special damages, and $3,000.00 general damages.

The complaint, the way it is drawn, would seem to limit the special damages to $1,500.00, because they are carried over, and I will order, therefore, that the prayer of the complaint be amended to conform to the proof, by finding that the actual loss in dollars and cents amounted to $2,750.00. I have got them here as $550.00 for advertising, and I have a loss of $500.00, a customers' loss of $600.00, a loss on violins of $150.00, materials used $200.00, and then $750.00 additional losses. I haven't itemized them, but I checked them as they were given in that order, and the prayer may be amended in that respect. I am doing that so as to segregate the special damages from the prayer, because the special damages have got to be proved with a greater approximation than the general losses to the business. And I find that $3,000.00 is a reasonable amount to award as damages to the business generally by the termination of this employment without notice. You will prepare findings.

Mr. Schwartz: Yes, sir. [117]

The Court: The findings, under the rules, will be served on the other side, and then the other side will have five days in which to object, in accordance with the rules, and in that respect our rules conform to the rules of the State Court.

The Clerk: Also, the conclusion of law and judgment, your Honor?

The Court: Oh, yes, plaintiff's counsel will draw the findings and judgment. [118]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of April, A.D. 1955.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 38, inclusive, contain the original

Complaint.
Answer.
Cross-Complaint.
Answer to Cross-Complaint.
Findings of Fact & Conclusions of Law.

Proposed Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order & Affidavit for Extension of Time to Transmit and File Record on Appeal.

which, together with a full, true and correct copy of the Bond on Appeal; 1 volume of Reporter's Transcript of Proceedings had on March 9, 1955; and plaintiff's exhibits 1 to 5, inclusive, (Plaintiff's exhibit 1 consists of the Clerk's original file and exhibits & depositions in case No. 14787-Y); all in said cause,

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 30th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14803. United States Court of Appeals for the Ninth Circuit. Alfio Batelli, Appellant, vs. Kagan & Gaines Co., Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14803

ALFIO BATELLI,

Defendant and Appellant,

vs.

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff and Respondent.

APPELLANT'S STATEMENT OF POINTS

I.

USCA Title 28, Rule 26. (d)sec(4).

Substitution of parties does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. (Emphasis Added.)

II.

Depositions Taken in a Prior Action May Be Used in a Subsequent Action Only When the Parties and Issues Remain Substantially Identical in the Subsequent Action.

Mid-City Bank & Trust Co. v. Reading Co. (1944) 7 FRS 26d, 62; 3 FRD 320.

Insul-Wool Insulation Corp. v. Home Insulation, Inc., (1949), 176 Fed. 2d. 502.

26 Corpus Juris Secundum 141.

Unruh v. Nelson,
297 Pac. 888.

Insured Life Fund Co. v. Ward,
77 Pac. 2d 890.

Code of Civil Procedure of the State of California, Sec. 2022.

III.

Depositions Taken in a Prior Completed Action May Not Be Used in a Subsequent Action; the Issues Are Not Identical.

United States v. Silliman,
(1946), 10 FRS 26d.62.

IV.

Depositions Taken in Other Actions May Be Used in a Subsequent Action Only When All Actions Arise Out of the Same Occurrence or When the Issues Are Substantially Identical.

Scotti v. National Airlines,
Inc. (1954), 19FRS26d.62.

Respectfully submitted,

/s/ SYDNEY S. FINSTON,
Attorney for Defendant and Appellant.

[Endorsed]: Filed August 1, 1955.